UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(SCC)

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

October 7, 2014

10:13 AM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Doc #44848 Motion for Relief from Stay and Injunction Provided Under Plan filed by Elizabeth Berke-Dreyfuss on behalf of Coleen Denise Colombo, Isabel Guajardo, Linda Howard-James, Cheryl McNeil, Michelle Seymour, Sylvia Vega-Sutfin

Doc #46173 Motion to Designate Diaz Reus & Targ, LLP as Agent for Receipt of All Distributions and Honor Change of Address in the LBHI and LBI Proceedings.

Adversary Proceeding: 08-01420-scc Lehman Brothers Inc.
Doc #9737 Motion to Impose Automatic Stay/Trustee's Motion for an Order Enforcing the Automatic Stay with Respect to a Civil Action Commenced by Barbara Newman Against the Debtor Pending Before the United States District Court for the District of Massachusetts

Adversary Proceeding: 14-02095-scc Bania Brothers, LLC et al. v Lehman Brothers OTC Derivatives Inc. et al.
Pretrial Conference

Adversary Proceeding: 14-02030-scc Lehman Brothers Special Financing, Inc. v. Merrill Lynch Capital Services, Inc.
Doc #8 Motion of Merrill Lynch Capital Services, Inc. To Dismiss Complaint (related document(s)5)

Doc #35787 Four Hundredth Omnibus Objection to Claims (No Liability Employee Claims)

Doc #36874 Application for FRBP 2004 Examination of Lehman Brothers, Inc.

Doc #37168 Four Hundred Thirteenth Omnibus Objection to Claims (Valued Derivative Claims)

Doc #38050 Four Hundred Twenty-Second Omnibus Objection to Claims (Employment Claims)

Doc #39348 Objection to Proof of Claim No. 22605 Filed by Sanford A. and Tina A. Mohr

Doc #39898 Motion to Allow Giants Stadium, LLC to Issue Third-Party Deposition Subpoenas Under Federal Rules of Bankruptcy Procedure 2004 and 9016

Doc #42516 Claims Objection Hearing with Respect to Debtors' Objection to Proof of Claim Nos. 21487 and 21488

Doc #42105 Four Hundred Fifty-Fifth Omnibus Objection to Claims (No Liability Claims)

Doc #44489 The Plan Administrator's Four Hundred Sixty-Eighth Omnibus Objection to Claims (No Liability Claims)

Doc #44488 The Plan Administrator's Four Hundred Sixty-Seventh Omnibus Objection to Claims (No Liability Claims)

Doc #44450 Motion for Alternative Dispute Resolution Procedures Order for Indemnification Claims of the Debtors Against Mortgage Loan Sellers

Doc #45446 Four Hundred Seventy-Seventh Omnibus Objection to Claims (No Liability Claims)

Doc #45448 Four Hundred Seventy-Ninth Omnibus Objection to Claims (No Liability Claims)

Adversary Proceeding: 14-02021-scc Moore Macro Fund, LP et al. v. Lehman Brothers Holdings, Inc., et al.
Doc #15 Motion to Dismiss Defendant's First, Fifth, Sixth and Seventh Counterclaims

Adversary Proceeding: 14-02234-scc Lehman Brothers Derivative Products, Inc. v U.S. Bank Trust National Association, et al.
Pretrial Conference

Adversary Proceeding: 14-02236-scc Lehman Brothers Holdings, Inc., in its capacity as v. Granite Finance Limited and HSBC Trustee (C.I.) Li

Pretrial Conference

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #7382 One Hundred Forty-Sixth Omnibus Objection to General Creditor Claims (Insufficient Documentation Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #6758 Trustee's One Hundred Second Omnibus Objection to General Creditor Claims (Satisfied Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #7666 Trustee's One Hundred Second Omnibus Objection to General Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8428 Two Hundred Fifteenth Omnibus Objection to General Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8483 Two Hundred Eighteenth Omnibus Objection Seeking to Allow Certain Filed Proofs of Claim in Reduced Amounts and with Proper Classification as Unsecured General Creditor Claims (FX Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8533 Two Hundred Twenty-Second Omnibus Objection to General Creditor Claims Seeking to (I) Reduce and/or Reclassify Certain Claims and to Allow Such Claims as Modified, and (II) Disallow and Expunge Certain Claims (Accounts Payable Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8567 Two Hundred Twenty-Third Omnibus Objection to General Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8858 Two Hundred Thirty-Third Omnibus Objection to General Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc. Doc #8966 Two Hundred Thirty-Fifth Omnibus Objection to General Creditor Claims (Satisfied Claims, No Liability Claims, and Subordinated Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9013 Two Hundred Thirty-Seventh Omnibus Objection to
General Creditor Claims (Employee Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9059 Two Hundred Fortieth Omnibus Objection to General
Creditor Claims Seeking to (I) Reduce Certain Claims and
Allow Such Claims as Modified, and (II) Disallow and Expunge
Certain Claims (Accounts Payable Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9161 Two Hundred Forty-Second Omnibus Objection to
General Creditor Claims (Employee Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9257 Two Hundred Forty-Fifth Omnibus Objection to
General Creditor Claims (No Liability Indemnity Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9394 Two Hundred Forty-Seventh Omnibus Objection to
General Creditor Claims (Employee Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9442 Two Hundred Forty-Ninth Omnibus Objection to
General Creditor Claims (No Liability and Insufficient
Documentation Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9470 Two Hundred Fiftieth Omnibus Objection Seeking to
Allow Certain Filed Proofs of Claim in Reduced Amounts and
with Proper Classification as Unsecured General Creditor
Claims (Financial Product Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9478 Two Hundred Fifty-First Omnibus Objection to
General Creditor Claims (Employee Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9482 Two Hundred Fifty-Second Omnibus Objection Seeking
to Allow in Reduced Amounts and with Proper Classification
as Unsecured General Creditor Claims Certain Filed Proofs of
Claim After Application of Setoff

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9529 Trustee's Two Hundred Fifty-Fifth Omnibus
Objection to General Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9525 Two Hundred Fifty-Fourth Omnibus Objection to
General Creditor Claims (Insufficient Documentation Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9530 Two Hundred Fifty-Sixth Omnibus Objection to
General Creditor Claims (Employee Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9583 Two Hundred Fifty-Seventh Omnibus Objection to
General Creditor Claims (No Liability Claims, Insufficient
Claims, and Claims Allowed in Reduced Amounts with the
Proper Classification)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9584 Two Hundred Fifty-Eighth Omnibus Objection to
General Creditor Claims (No Liability Indemnity Claims
(WaMu))

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9601 Two Hundred Fifty-Ninth Omnibus Objection to
General Creditor Claims

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9605 Two Hundred Sixtieth Omnibus Objection to General
Creditor Claims (No Liability Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9658 Two Hundred Sixty-First Omnibus Objection to
General Creditor Claims (No Liability, Insufficient and
Subordinated Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9667 Two Hundred Sixty-Third Omnibus Objection Seeking
to Allow Certain Filed Proofs of Claim in Reduced Amounts
and With Proper Classification as Unsecured General Creditor
Claims (Financial Product Claims)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9712 Motion of FFI Fund, Ltd., FYI, Ltd. and Olifant
Fund, Ltd. For Entry of an Order to Permit a Late Claim
Filing Pursuant to Federal Rule of Bankruptcy Procedure
9006(b)(1)

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9736 Two Hundred Sixty-Fourth Omnibus Objection to No
Liability Claims

Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
Doc #9744 Two Hundred Sixty-Fifth Omnibus Objection to
General Creditor Claims (No Liability and Insufficient
Claims)

02:00 PM
Adversary Proceeding: 11-02403-scc Lehman Brothers Special
Financing, Inc. et al v. Americredit Financial Services,
Inc., et al.
Doc #14 Motion to Dismiss Adversary Proceeding / Notice of
Motion and Motion to Dismiss Adversary Complaint (related
document(s)10)

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P R O C E E D I N G S

THE COURT: Good morning.

MR. GWILLIAM: Good morning, Your Honor.

THE COURT: Good morning, Ms. Marcus.

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil, Gotshal & Manges, LLP on behalf of Lehman Brothers Holdings, Inc. and its related debtors.

Your Honor, the first matter on the calendar this morning is a motion for relief from stay and Mr. Gwilliam will be handling that.

MR. GWILLIAM: Good morning, Your Honor.

THE COURT: Hi.

MR. GWILLIAM: My name is Gary Gwilliam. I've come out here from Oakland, California for this hearing --

THE COURT: Welcome.

MR. GWILLIAM: -- and I'm very pleased and honored to make this appearance in the court. I represent six creditors, Coleen Colombo, et al. We have set forth in some detail in our papers and our reply brief --

THE COURT: Yes.

MR. GWILLIAM: -- the reasons that we think that relief from stay is appropriate.

I would only say as a general matter this, Your Honor: I think all of us are interested in resolving these claims after all these years. Certainly, my clients are.

THE COURT: Sure.

MR. GWILLIAM: Obviously, the Court is, and I believe that the debtor is, too. And I believe that the best and most efficient way to do that is to send it back to the Sacramento Superior Court.

THE COURT: Well, let -- first -- one thing that is not clear from the papers is notwithstanding the fact that the claims have been pending for as long as they have, what exactly has occurred in California in the California litigation.

MR. GWILLIAM: The California litigation started -- huh?

THE COURT: No. I'm just waiting for your answer.

MR. GWILLIAM: Yes. Well, as you know, there was a motion to arbitrate the cases which was ruled in our favor, in the plaintiffs' favor. There -- the arbitration was denied. We had an appeal that took about two years. That appeal also came down in favor of the plaintiffs. Then the litigation started. It went on for about a year and a half. There were about 10,000 documents that were exchanged, extensive interrogatories. The first plaintiffs' deposition was taken and completed. We were in the process of setting and moving forward the rest of them when the stay occurred in January of '09.

So there has been a good start towards this. And

I would tell you, Your Honor, I'm quite familiar with the Sacramento Superior Court. They're very efficient in moving their cases along. They demand that we have good settlement conferences beforehand. They move them along. They try and get their cases out within about a year. I think if we did that we could get a trial date well within the year in the Sacramento Superior Court.

But our objective, obviously, is to resolve the cases and I think by returning them to the Superior Court they'll resolve them. This courtroom retains jurisdiction, of course.

THE COURT: I don't know what that statement means that I would retain jurisdiction. All -- what you're suggesting is that everything would occur out there and then to the extent that there were a liquidated claim, that would be presented as an allowed claim in the case. So you're asking me actually to relinquish jurisdiction over the liquidation of the claim. And everything that you've gone through short of a trial, short of a trial can be done at least as quickly here. If the plaintiffs are -- the plaintiffs are all California residents?

MR. GWILLIAM: Yes, they are.

THE COURT: And the -- if the debtor is willing to travel to California, as they undoubtedly would have to in order to take their depositions, then that's a wash,

correct?

MR. GWILLIAM: If the litigation takes place in California, of course.

THE COURT: Well, what difference does it make whether the litigation takes place in California or here if the burden would be on the debtors to go to the home state of the plaintiffs and take their depositions. That's -- that's a wash. That's --

MR. GWILLIAM: Well, my understanding -- these are tort cases. My understanding they're tort cases. We have a right to a jury trial; that they're not typically litigated in Bankruptcy Court.

Now I have bankruptcy counsel to --

THE COURT: Well --

MR. GWILLIAM: -- assist me in this matter.

THE COURT: You're -- I'm asking one question and you're asking -- you're making another point.

MR. GWILLIAM: All right.

THE COURT: My point right now is about -- your statement was that there was additional depositions that would need to be taken.

MR. GWILLIAM: Correct.

THE COURT: And I'm balancing, as I'm required to do under the Sonnax factors. So the debtor is saying, keep the litigation here for now and those depositions would

presumably be conducted by counsel representing the debtors in California. No additional burden to your clients, correct?

MR. GWILLIAM: Well, they would be -- would they be litigated under the rules of procedure in California because it's a California Court, Superior Court?

THE COURT: No. I'm talking -- I'm only talking about the burden -- your papers are -- the cardinal -- one of the cardinal points is the inconvenience to your clients of having to travel here. I'm taking travel off the table.

MR. GWILLIAM: Well, I appreciate that, Your Honor. And I don't want to have us be talking across purposes here. My understanding is that the litigation and the discovery needs to be done under the rules of the California Superior Court. But if --

THE COURT: Why is that?

MR. GWILLIAM: -- the Court's concern, Your Honor -- maybe I'm getting ahead of myself. But if the Court's concern is that you are losing jurisdiction and control over this claim, you can certainly have us report in anytime on the status of the case. But if depositions are to be taken and there's a stay of discovery in the Superior Court, how do we proceed with discovery?

THE COURT: We're not communicating very well.

MR. GWILLIAM: I'm sorry. I apologize.

THE COURT: What I'm talking about is the scenario in which I deny your motion.

MR. GWILLIAM: Right.

THE COURT: If I deny your motion --

MR. GWILLIAM: Uh-huh.

THE COURT: -- what I've analyzed is the burden -- is the -- among other things is the balancing of the burdens. And --

THE COURT: Fair enough.

THE COURT: Okay. And one of your key points was that your folks ought not to have to travel to New York. And what I'm saying to you is that's fine because if I keep the case for all pretrial purposes, then they do not have to travel to New York. The difference, whatever it may be between taking a deposition under the California Rules of Procedure and the Federal Rules is frankly not something that's going to be outcome determinative for me. I don't think I'm required to consider that.

I'm simply trying to say to you that if one of your concerns is that -- as articulated is the burden on your clients, I can have the debtors confirm that that's off the table. They're not going to have to travel.

MR. GWILLIAM: Well, that certainly was a consideration that we put into having the mediations done in San Francisco. And that was an issue that we went forth on

that, and that certainly would be an issue if the Court were to ask us to litigate the case in the District Court in New York. That would be a hardship and we would probably make a motion for a forum non-convenience if we had to litigate the case in the District Court.

But I don't understand exactly how we can start discovery if there's still a stay in place in the action in the Superior Court. That's confusing to me.

THE COURT: You would start discovery because I would deny the motion for relief from the stay and the litigation would remain here until such time, if ever, it was trial ready at which point you would either renew your motion for relief from the stay or there would be a withdrawal of the reference and it would be tried in the District Court.

MR. GWILLIAM: I understand what the Court is saying and I appreciate that. I still think the best way to resolve the case, if we -- that's what we all want, is to have the same thing happen except that we move forward towards a trial date in the Superior Court which is where we have to --

THE COURT: Right. But if that --

MR. GWILLIAM: -- try the case.

THE COURT: -- if that were the standard, then there a central -- the notion of a central claims resolution

process in a bankruptcy would never pertain. Every plaintiff similarly situated to your clients would prefer to go home to a home court to litigate. The Sonnax factors and the application of the Sonnax factors directs that I consider a number of factors in balancing the interest of all concerned.

MR. GWILLIAM: I understand.

THE COURT: What I'm saying to you is I got you covered on inconvenience and burden in terms of your clients having to travel.

MR. GWILLIAM: Right.

THE COURT: I got you covered in terms of expedition, the expeditious proceedings because I move really fast.

MR. GWILLIAM: Okay.

THE COURT: Okay. You can ask anyone that's sitting around you. I move really --

MR. GWILLIAM: Your reputation --

THE COURT: -- fast.

MR. GWILLIAM: -- precedes you, Your Honor.

THE COURT: Okay. So that part. Then we would get to dispositive motions, if any, here which I would get to really fast, and then to the extent that there's something to either send back to California or send up to the District Court subject to forum non-convenience. Maybe

it gets moved to the District Court in California, that just seems like it addresses everybody's needs and concerns.

MR. GWILLIAM: Well, Your Honor, I will say this. We're certainly on the same page when it comes to moving this case on as quickly and expeditiously as possible.

THE COURT: Sure. And, you know --

MR. GWILLIAM: Our case has been going for nine years.

THE COURT: Absolutely.

MR. GWILLIAM: So, I mean, anything that this Court can do to assist us in bringing this case to a final resolution, I'm 100 percent okay with. I have a little concern procedurally about how we do this, but those things can be worked out. And if you want us to engage in some discovery and report back to this Court and do so, that's --

THE COURT: Well, it's more than that. It's -- what I'm saying to you isn't -- and perhaps we -- I can hear from the debtors -- is denying your motion and getting on with it here at least through dispositive motions and/or until there's a moment where it's trial ready and you are ready for a jury trial, and then we would deal with that -- we would cross that bridge when we come to it.

MR. GWILLIAM: Okay. But I -- when you say dispositive motions --

THE COURT: The debtors have indicated that they

believe that there might be a dispositive motion, a motion to dismiss or a motion for summary judgment --

MR. GWILLIAM: Right.

THE COURT: -- which I have the ability to adjudicate, notwithstanding the jury trial right.

MR. GWILLIAM: Well, I would prefer that, of course, it would be under the rules of California, but I'm not here to tell the Court that you can't adjudicate it. I think you want to move the case along expeditiously and I appreciate that.

But I -- and I also think that the Court could have us report back in on a regular basis even if we went back to California. I don't think you would lose any control over the case as I see it.

THE COURT: It's -- there's no job sharing. It's either me or, you know, or another judge in those circumstances. It's not a -- it would be delightful to work with a California judge, but it's just not the way. It's not the way that it works.

Let me hear from the debtors for a moment if you would.

Thank you.

MS. MARCUS: Good morning, again, Your Honor. Jacqueline Marcus.

THE COURT: So, Ms. Marcus, notwithstanding

everything I just said, you know, it's awfully difficult to have folks sitting around for nine years. So what can we do to move this along?

MS. MARCUS: I understand that, Your Honor. There are -- the thing that's unusual about this case is that the litigation was commenced several years before --

THE COURT: Before --

MS. MARCUS: -- BNC's case was even filed.

THE COURT: Right.

MS. MARCUS: But as Your Honor is no doubt aware there are thousands and thousands of creditors who have been waiting at least six years for the most part.

THE COURT: Right.

MS. MARCUS: And we're certainly sympathetic. We -- as Mr. Gwilliams said, we've had two rounds of litigation. We did go to California to try to accommodate the plaintiffs.

I would note that not all of the claimants live -- are California residents. I believe there's one from Utah and one from somewhere else in the Midwest.

You know, this is a process, Your Honor. You're well aware of that and we are managing claims in the best way that we think what's best for the estates. As eluded to in our papers and in Mr. Gwilliams' papers, there are some very large claims in the BNC case that may have the effect

of consuming, basically, what's available for unsecured creditors.

So from the plan administrator's point of view it's not quite sure how many -- how much in resources to devote to defending these claims because if it turns out that the recovery is virtually zero or nothing meaningful, then it wouldn't make sense to spend a lot of money litigating over these claims because this litigation can be costly.

THE COURT: So how much has been spent already towards the $5 million retention? Do you have any idea?

MS. MARCUS: I do actually. I don't have it as of today, October 7th, but when we were preparing for the mediation or shortly thereafter we did a calculation and it came out to something like $795,000. So we're still quite a bit away from the $5 million retention.

And in terms of the insurance issue, which is an important one under the Sonnax factors, the insurer has not accepted responsibility for defending these claims, again because we haven't hit the $5 million limit. So unlike many of the cases cited by the claimants, this is not a situation where there will be no impact on the estate if --

THE COURT: Right. Well, that's the classic --

MS. MARCUS: -- relieved from the stay.

THE COURT: That's the classic easy one where

relief from the automatic stay is granted because the plaintiffs are going to only look to insurance and there's no impact --

MS. MARCUS: That's correct.

THE COURT: -- on the general estate.

But what you're saying gives me pause because it suggests that part of what the debtor would seek to do would, in fact, be to delay in order -- understandably from the debtors' standpoint in order to wait to see if there's any money available for distribution to unsecureds.

MS. MARCUS: Given the choice we would like to do that, but if we don't have the choice then obviously we'll have to make a different decision. We would fall back to the claims procedures orders. We did file an objection to the claims and that's what instigated mediation. We haven't had a sufficiency hearing on these claims. And so we would fall back to the -- what I'll call the normal procedure for dealing with these claims.

THE COURT: And the debtors would be prepared to do that with all deliberate speed?

MS. MARCUS: I suppose so.

Your Honor, we've gone through the Sonnax factors in our pleadings.

THE COURT: Yes.

MS. MARCUS: I had a rather long presentation

going through some of the responses in the reply, but, frankly, based upon what I've heard the Court say I'm not sure that there is very much that I need to add. I think I would just emphasize again the insurance issue and the fact that in the first instance numerous courts have held, both in this district and outside this district, resolution of claims is one of the principal responsibilities of this Court and we think it should remain here.

THE COURT: All right. Thank you.

MR. GWILLIAM: Your Honor, I would like to address this insurance issue. This is the first time we've heard anything about what the retention was. And as you know --

THE COURT: It was -- it was in the papers.

MR. GWILLIAM: Not the $795,000.

THE COURT: Oh, the 7 --

MR. GWILLIAM: The amount of the --

THE COURT: Yes. Yes. I agree.

MR. GWILLIAM: Yeah. The --

THE COURT: I agree with you. Yes.

MR. GWILLIAM: And I don't know how that's calculated and I'm concerned as to where we're going with that. But --

THE COURT: Well, I'll tell you exactly where we're going with that. I mean, the -- if we were at $4.6 million, then we would be within, you know, a little bit of

distance of the retention being exhausted and, therefore, the defense would be assumed by the insurance company and it would be -- there would be no risk to the estate and you would be -- things would be good for you because then you would have a source of recovery.

What 795 means is hypothetically if you were to go to trial tomorrow, right, and get a judgment for $4.2 million, what Ms. Marcus is saying, I believe, is that at the end of the day -- you would have that as an allowed claim. But at the end of the day the way that other claims may fall out in that case, there may be no money available for distribution to unsecured creditors like your clients. And because you would not have gotten over the $5 million retention, which I think of as a deductible --

MR. GWILLIAM: Right.

THE COURT: -- there would be no insurance proceeds. So it would be a (indiscernible) victory because you would have gotten an allowed claim in a big amount, but as is sadly happens in bankruptcy sometimes, there's no value available to pay the claim.

MR. GWILLIAM: I'm very clear on that. I'm 100 percent clear --

THE COURT: Okay.

MR. GWILLIAM: -- on that.

THE COURT: Okay.

MR. GWILLIAM: What I'm uncertain about, and we did -- we never submitted a policy to you. It was given to us confidentially. A small part of it has been given to you. I have the entire policy that I can give you for an in camera review.

But what -- and I've reviewed the policy carefully. But what I don't understand about these defense costs is I thought I heard Ms. Marcus say that $795,000 had been incurred by the Orick firm which was the firm defending the case in the Sacramento Superior Court. What I don't know is whether there is a defense claim for all the work that the Weil Gotshal firm has done. They've been defending this company for years. They've come out and done two mediations. Why isn't all the work they've done a part of that retention deductible?

So I don't know how that's been --

THE COURT: Well --

MR. GWILLIAM: -- calculated, the $795,000 figure.

THE COURT: Okay. Well, let -- we have Ms. Marcus here. Maybe she knows the answer to that.

MR. GWILLIAM: Yeah. I don't -- this -- because this is the first time I've heard 795. That's --

MS. MARCUS: I can clarify that.

THE COURT: Okay.

MS. MARCUS: 795 is composed of the Orick fees and

the Weil Gotshal fees, and there's another firm that was recently involved in the first mediation.

MR. GWILLIAM: Right.

MS. MARCUS: Weil wasn't at the first mediation.

THE COURT: Okay.

MS. MARCUS: So it's the aggregate.

MR. GWILLIAM: Okay.

MS. MARCUS: Yes.

MR. GWILLIAM: But, again, that's the first time I've heard that figure. I haven't heard it calculated.

THE COURT: Okay. But does -- but does that -- does that make a difference --

MR. GWILLIAM: well --

THE COURT: -- in your understanding?

MR. GWILLIAM: Well, what happened -- I -- we can't get too much into what happened in the mediation because I don't want to violate the privilege. But my understanding was after the mediation we're going to have the carrier, who I've had experience with I might add in settling other cases, see if they were interested in coming to the table to contribute something. I think the value of these claims exceeds the deductible and there's no reason that they might not want to contribute.

But -- so --

THE COURT: Well, I don't think that -- I mean,

we're off the -- rather off the path of analyzing the Sonnax factors. I don't think that keeping it here or sending it there precludes -- the debtors would be delighted if the insurance carrier wants to come in and contribute. I don't know under what scenario the insurance carrier would be interested in having that conversation when are, frankly, so far away from the retention amount.

And, of course, I have no concept at all of what the damages are that you're -- you know, that you're seeking in the action.

MR. GWILLIAM: Right. Well, you know --

THE COURT: And there are also other legal impediments which have been mentioned including the individuals who were the supervisors --

MR. GWILLIAM: That's right. I mean --

THE COURT: -- involved and the existence and the conduct of those individual or individuals may serve as a factor that would preclude liability of the debtor here. All of those issues, I think, would be properly raised in a sufficiency hearing before this Court which is what Ms. Marcus was referring to.

MR. GWILLIAM: Well, I do understand. So there's two points I want to make.

First, I think that if the case were to go back to Sacramento the insurance company could be ordered to at

least appear at a settlement conference, which is typically done. Now you may have jurisdiction to do that here.

But the second point that I do want to raise, and I think this is an important point, is that the individual defendants are not a part of the bankruptcy case. They never have been. The (indiscernible). They're important people, but they are not a part of the stay order. The stay order is only as to BNC, not as to the named individual defendants and there are three named individual defendants in the case which is another factor as to why we thought if we need full resolution, which I understand is the first and maybe most important Sonnax factor, can't really be resolved here.

So, again, I am fully in favor of trying to do anything we can to move this case along on behalf of my clients. But I just see some procedural issues here that concern me a little bit. But I -- I --

THE COURT: Ms. Marcus, what about the --

MR. GWILLIAM: -- I know that this Court is trying to --

THE COURT: -- what about the issue of the other defendants in the action? How do I deal with that, the individual defendants?

MS. MARCUS: I think one way to deal with it would be for Mr. Gwilliams to try to sever BNC from the other

defendants in the California action and then he could proceed against those other defendants in California without any delay.

MR. GWILLIAM: Well, Your Honor, (a) I don't --

THE COURT: And you wouldn’t seek -- obviously would not seek an extension of the stay to stay that?

MS. MARCUS: I -- I can't imagine that we would. We would not.

THE COURT: That --

MR. GWILLIAM: I don’t' think that's good -- a good tactic for us. I wouldn't voluntarily sever them. I've never done that with individual defendants. I think we need them and we need them together. And then, you know, we've got to lift the stay to do that anyway. We can't do anything in --

THE COURT: No. You don't need to lift the stay. She's going to say that she's going to consent to a lifting of the stay for the purpose of your severing that action. And you can proceed along against those individual defendants, in other words, the actors who allegedly performed the acts and engaged in the conduct of which you complain. And that's going to be --

MR. GWILLIAM: But their acts were in the course and scope of their employment and BNC is liable for their conduct whether we sever them or don't sever them. So I --

THE COURT: Well, that -- that's a question -- that's not something that I can agree with you or not agree with you. I have no idea whether their actions were within the scope of --

MR. GWILLIAM: Well, they were employees of -- all their actions were employees. We (indiscernible) -- I'll represent that to the Court. But I don't think that's a good approach for us is to pull out individual defendants in an employment action such as this. I mean, I do a lot of employment work. That's just not the appropriate way to go in my opinion. It's not in the best interest of my clients to do that.

But I just raise that as another procedural problem here that we run into. But, again, Your Honor, I'm here. I came out here to --

THE COURT: Okay. Well, I think that there's no perfect solution. I think that your clients are entitled to have this be moved along and that it should not be -- your clients should not be prejudiced unduly by the fact that it's unclear whether or not there will be a recovery for them.

But I would focus you very strongly on the reality of the situation which is the wide gap between what's been incurred in defending the action at this point and the retention amount. If we can -- if you can bring the

insurance company to the table, wonderful. I think that the debtors wouldn't mind that in the least.

But in the meantime, I think that going through all the Sonnax factors, and it is a close call, I think that for the time being the action stays here. The stay is not listed -- lifted. We're going to move onto in the claims procedure. We will have a sufficiency hearing, and at such time as there's nothing more that I can do you can renew your motion and the proceed to trial either in California or in the Federal District Court, either here or in California. But we're a couple of steps away from that.

MR. GWILLIAM: All right. So the next step at this Court then would be for us to move forward with the sufficiency hearing, right?

THE COURT: Ms. Marcus?

MS. MARCUS: That's correct, Your Honor.

THE COURT: Yes.

MR. GWILLIAM: All right.

THE COURT: All right.

MR. GWILLIAM: I appreciate your --

THE COURT: I appreciate your coming out here.

MR. GWILLIAM: -- wanting to resolve this and I thank you very much, Your Honor.

THE COURT: I very much do. All right. Thank you very much.

Ms. Marcus, you'll share an order with counsel and send it to us?

MS. MARCUS: Yes, I will, Your Honor.

THE COURT: Thank you.

MS. MARCUS: Your Honor, the next matter on the agenda was listed as contested, but late last night I think that the objection was withdrawn. It's (indiscernible) motion to designate Dias Reus & Targ.

THE COURT: Good morning.

MR. BANGOS: Good morning, Your Honor. My name is Nick Bangos appearing for (indiscernible). With me present in the courtroom is also Marta Colomar.

THE COURT: Okay. Is anybody here from the Chadborne (ph) firm?

Well, that's unfortunate because if they were here I would tell them that it's far preferable to withdraw a somewhat frivolous objection before the Court and chamber staff have literally spent hours trying to figure out how to dispose of it.

So if someone would be kind enough to pass that along to the Chadborne firm, I would appreciate it.

MS. MARCUS: We will do that, Your Honor.

THE COURT: All right. So you folks need to tell me what the order is going to look like with respect to both LBHI and LBI.

MR. FITZPATRICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. FITZPATRICK: Jim Fitzpatrick for the LBI trustee.

THE COURT: And I meant that in the nicest possible way.

(Laughter)

MR. FITZPATRICK: Your Honor, at least on behalf of LBI, and we summarized this briefly in a statement, what we would request in addition to Your Honor's order essentially granting the motion in terms of who the proper distributee is --

THE COURT: Right.

MR. FITZPATRICK: -- would be at least for the LBI trustee, and I don't know if the LBHI trustee needs this or not, but for the LBI trustee just to include a provision in the order that makes clear that the trustee is released from any liability as to any competing claims for this same amount as part of the determination that's --

THE COURT: Right.

MR. FITZPATRICK: -- properly paid.

THE COURT: I mean, it's a curious thing, right, because somebody shows up and says, oh, you can't give it to them because of the existence of me. And yet when you go about your everyday business of distributing funds, you

don't have that kind of protection. So it's kind of a funny thing, right?

MR. FITZPATRICK: It's true. Your Honor, the only difference here being that we were put on notice of compete -- potentially completing claims and that's --

THE COURT: Right.

MR. FITZPATRICK: -- that's the only reason we would make that request.

THE COURT: So as part of the withdrawal of the objection they're agreeing in an order that they're done?

MR. FITZPATRICK: Well, we would -- what we would propose is we would draft an order with that provision and circulate it so that there would be no doubt. That's how I interpret it, but we would give them --

THE COURT: Okay.

MR. FITZPATRICK: -- that last chance.

THE COURT: That would seem to be only fair.

MR. FITZPATRICK: Yes. If -- that's what we -- we would volunteer to do the order and circulate it if that's acceptable --

THE COURT: Okay.

MR. FITZPATRICK: -- to Your Honor.

THE COURT: So that there's going to be one order for LBI and one order for LBHI?

MR. FITZPATRICK: I just don't want to speak for

LBHI.

MR. FAIL: Good morning, Your Honor. Garret Fail from Weil, Gotshal and Manges for Lehman Brothers Holdings, Inc. The plan administrator makes distributions twice a year to the record holder that has completed the requisite tax forms and other certifications that are required.

To the extent that there's an order that is entered directing payment to his party, we're happy to review it and provide comments --

THE COURT: Okay.

MR. FAIL: -- so that it's submitted on consent.

THE COURT: Okay. All right.

Yes.

MR. BANGOS: Judge, Nick Bangos for (indiscernible). I have nothing to add on the comments to the LBI issue.

THE COURT: Okay.

MR. BANGOS: On the LBHI case, there's two distributions that are sort of backlogged. There's the fifth distribution that was supposed to be in April and the sixth distribution, I believe, in September. Rather than waiting for the semi-annual distributions, we would ask the Court to authorize the plan administrator to release those two distributions immediately or within a short period after the entry of --

THE COURT: Does the plan administrator agree to that?

MR. FAIL: No, Your Honor. The plan administrator does not. The plan administrator provides catch up payments in accordance with the plan semi-annually and to break precedent at this point --

THE COURT: Yeah. It's just one of those things. I think that as claims get resolved it would pose an undue burden on the plan administrator to do one off distributions. So I'm going to deny that request and you'll just get a very large sum of money next time around.

All right. Thank you so much for coming in.

MR. BANGOS: Thank you for allowing me to appear.

MS. MARCUS: Your Honor, that concludes the LBHI part of the agenda. I guess there are some matters on the LBI calendar, and if I --

THE COURT: Okay.

MS. MARCUS: -- and then there's the adversary proceeding calendar --

THE COURT: Yes.

MS. MARCUS: -- yet to come. May I be excused?

THE COURT: Yes. Thank you --

MS. MARCUS: Thank you.

THE COURT: -- Ms. Marcus.

(Pause)

THE COURT: Good morning.

MS. GRAGG: Good morning, Your Honor. Meaghan Gragg of Hughes, Hubbard & Reed, counsel for the SIPA trustee. The first item on our agenda is an uncontested matter that will be handled by my colleague, Erin Diers. But before we start with the agenda, Mr. Baumstein from White & Case has requested that I inform the Court that he wishes to address a letter that was filed last week, but is not on the agenda.

THE COURT: I'm not hearing you today.

MR. BAUMSTEIN: Okay, Your Honor. I just wanted to address the (indiscernible)_ adjournments to see if --

THE COURT: It's not on the agenda. I'm not hearing you today.

MR. BAUMSTEIN: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MS. GRAGG: So we'll proceed with the agenda.

THE COURT: Go ahead.

MS. DIERS: Good morning, Your Honor. My name is Erin Diers. I'm with Hughes, Hubbard & Reed and I'm here on behalf of the SIPA trustee for Lehman Brothers, Inc.

The next matter on the agenda is an uncontested matter, the trustee's motion for an order enforcing the automatic stay with respect to an action filed by Barbara Newman in the Massachusetts District Court which is at ECF

9737 and is supported by the declaration of Mary Pierce (ph). Ms. Pierce is here in the courtroom today to the extent you have any questions for her.

THE COURT: All right.

MS. DIERS: The motion was served on both Ms. Newman and her counsel in the Massachusetts action. Neither party has responded or otherwise contacted us. As the motion is uncontested, I can give a brief walk through of it if you would prefer.

THE COURT: That -- I think that's fine. Let me ask if anybody is in the courtroom who would like to be heard on the trustee's motion for an order enforcing the automatic stay with respect to an action commenced by Barbara Newman?

All right. Let the record reflect no response. I'll grant the motion.

MS. DIERS: Thank you, Your Honor.

THE COURT: Thank you.

Okay. I think the Ortigon (ph) matter is next.

(Pause)

THE COURT: Ready when you are.

MS. GRAGG: Good morning, Your Honor. Meaghan Gragg with Hughes, Hubbard & Reed, counsel for the SIPA trustee. We're here on the trustee's motion for summary judgment on the trustee's objection to the general creditor

claim filed by Mary Ortigon. The claim is for $350,000 plus interest.

Briefly, upon the trustee's objection the claimant responded and the claimant dispute went to mediation pursuant to the ADR procedures established by the Court. The mediation occurred in April of 2014 and concluded without resolution. The trustee was served with discovery requests and produced all documents responsive to the request that we were able to locate based on a reasonable search.

Your Honor, summary judgment is appropriate here because it is undisputed that the $350,000 bonus Ms. Ortigon is claiming was contained in an offer of at will employment. LBI was entitled to rescind its offer of employment or terminate her for -- at any time for any reason. LBI rescinded its offer of employment and Ms. Ortigon never actually began work at LBI or performed any work whatsoever for LBI.

Given these undisputed facts, the only issue for the Court to decide is whether, under the terms of the offer letter, the claimant is entitled to the $350,000 bonus regardless of the fact that she never performed any work for LBI.

THE COURT: What about the fact that there's been an allegation that the rescission of the offer was wrongful

inasmuch as there were issues raised over whether or not she had completed her executive MBA and how much time that would take? Is that not a factual issue that precludes the summary disposition?

MS. GRAGG: Your Honor, the trustee's position is that the claimant hasn't actually raised an issue of fact on that point. In the statement of facts submitted in support of Ms. Ortigon's response there's no allegation supported by any evidence that there was any wrongful rescission of the contract or termination of Ms. Ortigon. The only potential issues of fact that she's raised have to do with the degree to which she discussed her -- the MBA program with Lehman personnel who interviewed her, the degree to which they were aware of it, and why they decided to rescind her offer. But there's nothing indicating that it had -- that decision had anything to do with anything other than this executive MBA program.

Our position is that any issues of fact surrounding that are immaterial because regardless of whether they knew -- the degree to which they knew about it they concluded that they didn't want to go forward with hiring her because they had concerns about those discussions.

Again, we don't think there's a genuine factual dispute regarding that because it's -- in our minds it

doesn't matter unless she's able to come forward with something showing that the rescission was wrongful which she hasn't.

THE COURT: All right. Thank you.

MS. GRAGG: So turning to the terms of the offer letter which it's our position that that is the issue to be decided here, the offer letter makes clear that the bonus is to be for compensation for the performance year of 2007 and that would be payable on or about January 31st, 2008, which is more than a year after her expected started date which would have been in January 2007 but never occurred.

The offer letter further specifies that the bonus amount would be paid at the time stated unless, amount other things, before the date of the scheduled payment the claimant resigned or was terminated for various reasons including the failure to satisfactorily perform work for LBI. Again, there's no dispute here that she never did any work for LBI.

There's nothing in the offer letter that indicates that the bonus was a sign on bonus or that it would be payable regardless of whether she performed any work. In fact, the terms of the offer letter, again, make quite clear that this is compensation for work.

I -- unless the Court has any other questions we're prepared to rest on our papers.

THE COURT: Thank you.

MR. BRECHNER: Good morning, Your Honor. Ethan Brechner for Ms. Ortigon.

I believe that there are numerous issues of fact that preclude summary judgment here.

First, there's an issue of fact as to whether she was an employee of the firm.

THE COURT: She was -- she was never an employee of the firm. There's no issue of fact.

MR. BRECHNER: Well, the -- for example, the filings that Lehman Brothers made with FINRA indicated that she was an employee of the firm on January 17th, 2007. That was a record that was filed. Those are documents that were filed by Lehman Brothers with the --

THE COURT: Did Ms. Ortigon ever work a day for LBI?

MR. BRECHNER: She was there. She was ready, willing and able to work --

THE COURT: Did Ms. Ortigon ever work a day for LBI?

MR. BRECHNER: She was barred from performing any work. The question, we believe, is whether she was legally an employee or not. There are documents that we submitted with our papers that Lehman Brothers then tried to figure out how to unhire her. There are several emails from

employees in human resources saying, how do we unhire an employee, and then they proceed to try and --

THE COURT: Doesn't the offer letter say that the -- it's not a contract of continuing employment?

MR. BRECHNER: It is, but we don't believe that that's relevant. If she was an at will employee and they fired her after four months or after three weeks of work or after one week of work, she still would be entitled to the bonus if the termination was not for cause.

So whether she was an at will employee --

THE COURT: Didn't the offer letter say that your employment by the firm is for no fixed term and either you or the firm may terminate the employment relationship at any time for any reason?

MR. BRECHNER: Absolutely it did. But the portion regarding the guaranteed bonus was not contingent on whether she was an at will employee or not. It --

THE COURT: It was contingent on her performing work. She never performed work. She --

MR. BRECHNER: It was --

THE COURT: -- did not work a day for LBI.

MR. BRECHNER: They decided to prevent her from doing -- performing any work.

THE COURT: They terminated her.

MR. BRECHNER: They did terminate her employment

and, therefore, they didn't have cause to terminate her employment and under the terms of the contract she's entitled to the bonus. She's not entitled to continued employment because she was an at will employee.

THE COURT: And you -- you believe that having never worked a day for LBI she's entitled to $350,000 in cash?

MR. BRECHNER: I believe that she signed the contract with the firm --

THE COURT: Answer -- would you please answer my question? You believe that she's entitled to $350,000 in cash?

MR. BRECHNER: She's -- I -- we believe yes. The agreement did say that there was some portion that potentially could be paid in the form of equity, not all, but some of it. It wasn't determined how much it would -- and what's unknown is if you terminate an employee during the year, for example, if she was fired after six months, does she get the whole bonus in cash or does the -- the stock plans, as I understand, generally contemplate some continued employment and vesting. But she -- if -- I don't think there would be any dispute that --

THE COURT: The debtor could stand up right now and say, good news. I'm going to give her $350,000 bonus in RSU's and restricted stock units and we would be done.

MR. BRECHNER: Well --

THE COURT: There would be no -- there would be no answer to that because there are hundreds if not thousands of employees who actually worked for years and years and years who have received nothing because their bonuses were similar to this bonus at the discretion of one or more of the debtors, payable in stock.

MR. BRECHNER: Well, was it the whole bonus and another thing is if an employee is terminated, which there has been no evidence that they would have given her all the bonus in the form of deferred compensation where she couldn't vest in any of it because she wasn't working there anymore. She wasn't -- if she had worked there for six months and they fired her under these plans, which normally contemplates some form of vesting over time, then --

THE COURT: You're making that up. That's not -- that's not necessarily the way that it worked and there's nothing like that in this letter.

MR. BRECHNER: Well, there's no -- that's not their argument at all in this -- on this summary judgment motion.

THE COURT: Their argument --

MR. BRECHNER: Their argument is --

THE COURT: -- is that they rescinded her offer, which they were entitled to do; that she never worked a day

for LBI; that the bonus was a bonus payable for performance working for LBI and that it's not payable because her offer was rescinded and she never worked for LBI. It's very --

MR. BRECHNER: Let's say she had --

THE COURT: -- straightforward.

MR. BRECHNER: -- started and the -- and there was another candidate who was out there who they thought was a better candidate. They hire Ms. Ortigon. The day after she's given an employee pass. She comes in and they come over to her. She hasn't done anything yet. They say, Mary, you know what, we really like you but we had another candidate who we've been trying to recruit --

THE COURT: If the contract says that she's terminable for any reason, then she's terminable for any reason.

MR. BRECHNER: Then she gets the bonus. She gets the guaranteed bonus. If she's terminated in that course of that year then she's entitled to the bonus as a guaranteed payment. She's not -- might not be entitled to work, to the continued employment, but she is entitled to the bonus. If after six months they're like, you know, we're -- we've changed direction --

THE COURT: Show me -- show me something that supports that.

First of all and second of all, those aren't the

facts. She never worked for LBI.

MR. BRECHNER: She became an employee, though. As a matter of law, she completed the pre-hiring requirements. There's a -- there was a checklist that they had submitted that she completed all of them. It's attached to our papers. She completed every single one of the requirements.

THE COURT: And then LBI rescinded the offer.

MR. BRECHNER: And they told FINRA that she was an employee. They filed with the regulators that she was an employee. It happened to be for one day, but she was an employee. According to their records --

THE COURT: So -- okay. So let's --

MR. BRECHNER: -- that they filed --

THE COURT: -- let's assume that she was an employee for one day. So your position is that for one day of employment she should have -- she should get $350,000.

MR. BRECHNER: Okay. Maybe equitably it doesn't seem fair, but the fact is is they made an agreement with her.

THE COURT: Maybe it seems ridiculous.

MR. BRECHNER: Well, she had a contract that said if they -- if she worked there a week --

THE COURT: She had a contract that said that if she works for LBI for the period prescribed. She, in the discretion of LBI, would be awarded a bonus that in LBI's

discretion would be in different forms of consideration including stock units.

MR. BRECHNER: Well, Your Honor, the contract says --

THE COURT: You're talking about the January 12th letter?

MR. BRECHNER: Right.

(Pause)

MR. BRECHNER: It says -- on the first page it says that the foregoing salary -- it says, "The bonus amount set forth above will be paid at the time in the amount stated except it will not be payable if you fail to obtain and retain in good standing all applicable license and registrations or if before the date of scheduled payment you have resigned or been terminated because of misconduct, breach of firm policies or rules, dishonesty --

THE COURT: But you're -- this is an offer, though.

MR. BRECHNER: It's -- she completed all the conditions to -- that were required of her under the offer letter and if they -- if she had started work and the day after they say, you know what, we don't like how you dress. We're terminating your employment she would be entitled to the $350,000. She might not be entitled to work there for the -- any period of time, but she would still be entitled

to the $350,000. That was the deal that they -- unless it was for misconduct or violation of policies or dishonesty or violations of laws, et cetera. That's the issue.

This was the deal they made; that -- and they barred her from performing any services based on a complete misperception of what she had told the firm during the pre-hiring process. Danielle Copolla (ph), the HR representative, is sending emails on January 17th saying, how come we didn't know about the EMBA program. She never told us about that in the hiring process.

And the record is replete with information that she had disclosed that. She had disclosed it on her resume. She had disclosed it to people she interviewed with. She disclosed to Muhammad Grenai (ph), the manager who was going to be her boss. We have an affidavit from her to that effect. There's no evidence whatsoever submitted by Lehman Brothers on its summary judgment motion that disputes that fact. The email that is in the record is that Ms. Copolla believed that she never told them about the program, period.

And Ms. Ortigon had told them. The record -- there's -- at a minimum there's an issue of fact about that. They then rescinded it, but she had already become an employee at that point. The contract terms were met. It may seem crazy to say you can get a $350,000 payment for not having done any work, but she did what was required of her.

She was ready, willing and able to work. She was ready, willing and able to change the EMBAD and the human resources representative was completely wrong about what she had disclosed during the hiring process. And --

THE COURT: Your claim is not one for wrongful termination. Your claim is one for a bonus for work that was never performed. Your claim is one for a cash payment for a bonus that by its terms was at the discretion of management not entirely payable in cash. You're asking for an extraordinary, extraordinary type of relief. You're asking for Ms. Ortigon to be treated better than employees who have worked at Lehman Brothers for years and years and years and lost everything because their bonuses year in and year out for work they actually performed was paid to them in the form of equity.

It would be wrong, it would be -- even if you were to survive this motion, which I do not believe that the claim can, there would then be a trial in which you would face the task of somehow proving hypothetically that had she worked this is how she would have performed and that had she performed that hypothetical way, then hypothetically she would have been awarded a certain amount in cash and a certain amount in equity.

That's not a path that we're going to go down.

MR. BRECHNER: Well, there's no argument that --

by Lehman that all of it would have been paid in equity. And that's an issue of fact as to how much it would have been awarded in equity.

THE COURT: We don't even get there. I'm --

MR. BRECHNER: And if she had worked one day and they said, we don't like your hairstyle and we terminate you, she's entitled to a bonus under the contract because it says you get that unless you're terminated for some cause that's defined in the contract.

So she -- there's no requirement for her to get the $350,000 that she work the entire year. There's no -- otherwise there would have been no reason to have included in the contract the language about misconduct or violation of policies or whatever. There's nothing that says she has to work the whole year. They are the ones --

THE COURT: Why haven't you filed a claim for wrongful rescission? It's not your claim.

MR. BRECHNER: This is a contract. She had a valid contract.

THE COURT: It was rescinded.

MR. BRECHNER: They didn't -- well, they breached it. They terminated her after there was a contract that was executed, enforced contract, and they decided not to honor the provisions. They say it was rescinded, but the fact is that they then terminated her after she was an employee,

after they tell FINRA, their regulator, that she's an employee.

THE COURT: Okay. Let me ask the counsel about -- what about the FINRA point?

Thank you.

MR. BRECHNER: Thank you.

MS. GRAGG: Well, Your Honor --

THE COURT: Was she -- was she an employee?

MS. GRAGG: She wasn't an employee, Your Honor. The -- she never began work at LBI. We have a rescission letter that was sent to her before she ever began work at LBI.

Claimant's counsel is referring to -- I'm just -- a snapshot from a FINRA system that mentions her for a day. Your Honor, I don't know the significance of her being in the FINRA system and claimant's counsel hasn't explained that or provided any evidence that -- beyond the screenshot what this is or what this means.

In our view, you know, claimant is trying to overcome the fact that she didn't work for LBI. Her offer was rescinded. It was rightfully rescinded. Claimant hasn't come up with any evidence to the contrary. And to overcome the fact that she never worked for LBI she's trying to grasp onto anything she can to show that she was an employee.

But the fact remains that she didn't work for LBI and the bonus was compensation for work performed. There's nothing in the offer letter that indicates that this would be a guaranteed bonus. We attached to our reply papers Lehman's policy on bonuses which clearly provides that it doesn't pay to employees if they're not working at the time that the bonus is payable. The offer letter clearly shows that that -- clearly provides that the bonus would have been payable on January 31st, 2008, over a year after the claimant would have started work, if she ever started work, which she didn't.

So, I mean, it's trying to turn -- the claimant's trying to turn this into a guaranteed bonus situation and there's just no indication in any -- in anything that's before the Court that that's the case.

THE COURT: All right. Thank you.

Anything else?

MR. BRECHNER: I would refer Your Honor to the January 12th contract. The language --

THE COURT: I'm sorry.

MR. BRECHNER: I would refer Your Honor to the January 12th contract. There would be no --

THE COURT: January 12th letter, it's not a contract. It's a letter.

MR. BRECHNER: There would be no reason in that

document to have language regarding termination for various reasons unless the --

THE COURT: Just let's get on the same page. Right. The January 12th letter is not a contract. It's an offer letter.

MR. BRECHNER: It was accepted by Ms. Ortigon signed by both parties.

THE COURT: Okay. Go ahead. I'm sorry.

MR. BRECHNER: And there would be no language -- there would be no reason for the language in the agreement for Lehman having a right not to pay the bonus on January 31, 2008 under circumstances where she was terminated for cause or she resigned. The --

THE COURT: Well, you've got to help me get past the language that says, third paragraph on the second page:

"Your employment by the firm is for no fixed term and either you or the firm may terminate the employment relationship at any time for any reason subject to any applicable notice requirement."

MR. BRECHNER: That doesn't address the issue of the compensation portion of the letter, which is if they had cause, if she worked there for six months and then she --

THE COURT: So let's go -- so let's take that one and then let's go back to the other page where it says that:

"The foregoing salary will be paid for all periods

of your active employment with the firm in the performance year 2007. The bonus amount set forth above will be paid at the time and in the amount stated."

The entire tenor of the contract is that -- is that this was proposed compensation for work that would be performed. She never performed any work. The offer letter was -- might have been accepted, but it was rescinded. Your claim is not for wrongful rescission. You're making a claim for the contractually guaranteed $350,000 bonus for the year 2007. She was never an employee. She never worked for LBI, notwithstanding the screenshot.

I think that based on all the arguments made by the trustee as -- and specifically as articulated here today, the trustee is entitled to judgment. I'm sorry that this happened to Ms. Ortigon. I hope that she found other employment and has become successful. But there is absolutely no basis for this claim to proceed any further and I appreciate your efforts.

MR. BRECHNER: Well, I mean, I -- we reserve all rights with respect to that order. I would ask -- I haven't investigated a wrongful rescission claim and I'm not sure what the elements of that are, but I would like an opportunity to amend the claim to assert that.

THE COURT: You have what -- you have whatever rights that you have.

MR. BRECHNER: All right. Well, I would just point out to Your Honor that the contract itself talks about situation where if she's working for six months and then they fire her and they say you -- you were tardy in coming into work for weeks and weeks so we're going to terminate you for violating our policies with respect to, you know, when you have to be at work. They could say, we're firing you and we're not paying you the bonus because we're firing you for cause. Right. Under that circumstance under this letter they would be entitled to do that assuming they could establish cause.

If she came in to work every day on time and they're just like, Mary, we don't like your hair and they terminate her, under this document that she signed she would be entitled to her bonus payable on January 31, 2008. That would not be cause. Otherwise, it would be completely superfluous to have that language in the letter with respect to the circumstances under which you could be divested of the bonus. The bonus is divested if she resigns or she's terminated for cause. She could work there -- she could have been there for --

THE COURT: Can I interrupt you to point out one thing? I've ruled.

MR. BRECHNER: Thank you, Your Honor.

THE COURT: Thank you.

MR. BRECHNER: Can we ask that the -- an order, I take it, will be submitted?

THE COURT: They'll circulate an order to you.

MR. BRECHNER: Thank you.

THE COURT: Thank you.

MR. BRECHNER: Thank you, Your Honor.

THE COURT: Thank you.

(Pause)

THE COURT: I believe the next matter is the pretrial conference in Bania Brothers.

Hello, Mr. Miller.

MR. MILLER: Good morning, Your Honor. May it please the Court, I'm Ralph Miller here in Adversary Proceeding Number 14-02095 for the plan administrator, Lehman Brothers Holdings, Inc., known as LBHI, and for the other defendant in this adversary proceeding, Lehman Brothers OTC Derivatives, Inc. known as LOTC.

We need this Court's guidance in this pretrial conference on a scheduling issue concerning the motion to dismiss that has been filed by the defendants, LBHI and LOTC. But a little background is necessary to put that issue in --

THE COURT: Okay.

MR. MILLER: -- context.

Briefly, the plaintiffs have proposed to convert

the defendants' motion to summary judgment into dueling -- I'm sorry -- the defendants' motion to dismiss into dueling motions for summary judgment and want to set a briefing schedule. But --

THE COURT: Do -- say that again.

MR. MILLER: Yes, Your Honor.

THE COURT: Say that again.

MR. MILLER: The plaintiffs who have brought this declaratory --

THE COURT: Yes.

MR. MILLER: -- judgment action have proposed to convert the defendants' motion to dismiss into dueling motions for summary judgment and to set a briefing schedule on two cross motions, but the plaintiffs have not yet, so far, been ready to comply with Local Rule 7056-1(a) which requires them to stay the "issues to be presented" or "the grounds for relief."

THE COURT: Okay.

MR. MILLER: And as I will explain to the Court there's an awful lot of issues and there's an awful lot of grounds, but there are a couple of focused issues that really ought to go first.

And so if I may briefly explain the plan administrator --

THE COURT: That want to go first in the vessel of

a motion to dismiss you say?

MR. MILLER: Yes, Your Honor. And they also should -- are issues that are going to be very helpful to the administration of all of these post-petition interest claims and the plan administrator would like to put that in context --

THE COURT: Okay.

MR. MILLER: -- very briefly.

To date there are four solvent debtors in the Lehman group: LOTC, one class of Lehman Brothers Commercial Corporation known as LBCC and those are the two largest solvent debtors, and then Lehman Brothers Derivatives Products known as LBDP and Lehman Brothers Financial Products known as LBFP. And under the plan those solvent debtors, under certain circumstances, will pay post-petition interest.

The majority of these claims are derivatives claims in LOTC, and typically those derivatives claims are based on master agreements published by the International Swaps and Derivatives Association known as ISDA masters, and two sample ISDA masters were attached. And as I'm sure the Court knows, under the printed terms of derivatives contracts there are some fairly complicated interest provisions in which termination payments have interest rates that depend on the cost of funds of the relevant payee.

Sometimes they depend on that.

In their declaratory complaint, the plaintiffs seek to have the Court determine whether the cost of funds of original holders of each derivative or the cost of funds of the current holders should apply. And that's an interesting question that someday this Court may need to decide.

However, these parties don't happen to have standing to create an actual case or controversy on that issue.

Now that issue is important because Your Honor will recognize, of course, that the cost of funds of a commercial derivatives holder in the ordinary course, like a big bank, is considerably lower than the cost of funds of special purpose vehicles like these that were formed essentially to buy claims.

As I will explain in a moment, the plan administrator believes that this issue cannot be presented in this particular proceeding because these three plaintiffs have two characteristics in common. First, all of them entered into release documents, at least their predecessor in interest did, on the six claims at issue. And that, we believe, set a fixed amount for each of these allowed claims.

And, second, Your Honor, the ownership of all six

of these allowed claims was transferred from the original holder at a time when the automatic stay was in effect in this proceeding, and there is a legal issue presented in the motion to dismiss about whether a party can increase the value of a claim when the stay is in place by transferring it; that that is a stay violation.

Now let me give the Court some idea of the significance of the release issue. Over 80 percent of the LOTC derivatives claims have been allowed for amounts set in release documents. So 80 percent of the LOTC claims have a release in one of the two forms that are before the Court.

The plan administrator believes the scope of these release documents is the first threshold issue that should be resolved, and that's squarely presented by the motion to dismiss. This motion to dismiss, I should stress, cites and refers to the release documents and its integral to the recovery and the releases have been provided in the declaration, which I signed, and we don't think there's any dispute about what the releases say.

Obviously, if these plaintiffs have released their claims for post-petition interest, actually their predecessors, they don't have an actual case or controversy on how to calculate something they've already released. And we cite cases that are clear.

Now, Your Honor, let me talk a little bit about

the transfer issue. The plan administrator believes that over 90 percent of the LOTC derivatives claims are held by claims purchasers rather than the original holders. That means that there were transfers of claims and each of these three plaintiffs achieved their claims through transfers and there was no lifting of the stay. And we believe that all of the cost of funds are higher (indiscernible) at least allege that (indiscernible), and there's a legal issue in some cases that we cited that says you can't take a claim and increase its value by selling it to somebody --

THE COURT: That would be --

MR. MILLER: -- just because --

THE COURT: That would be quite a cottage industry, would it not?

MR. MILLER: It would not be a cottage industry, Your Honor. We're talking about hundreds of millions of dollars here. This is not a small issue.

Now these three plaintiffs can present an actual case or controversy for declaratory relief on the calculation of pre -- post-petition interest only if both of these legal questions in defendant's motion to dismiss are answered in the negative; that is, if the Court finds that there was no release and the Court finds that there was no violation of the stay through a transfer that would increase the value of the claim.

With that background, we've had some scheduling conversations. We've reached agreement on an extension of time on the motion to dismiss itself. We -- the plaintiffs would have 35 days until October 22nd to respond, and the plaintiffs agree the defendants may have three weeks.

The difficulty we have, though, is when we started working on a proposed order, the plaintiffs wanted to file a cross-motion for summary judgment at the same time that they responded to the motion to dismiss.

Now we think that Your Honor has to decide whether they're going to get a cross-motion. We don't think that Rule 12(d) -- which is, of course, incorporated by 7012 -- envisions that this means all summary judgments are certainly -- suddenly opened up if the Court decides to convert a motion to dismiss into a motion for summary judgment. The motion to dismiss, of course, serves the function of Rule 7056(1)(a) because you have the grounds. You have the issues. The only question is do you consider the releases attached to my declaration or do you want just say they're entered with the complaint and, therefore, they're on a motion to dismiss.

I will let counsel explain their position further. We have sought information on the contents of a proposed cross-motion and were told those contents had not been decided yet. So there was plenty of time for the plaintiffs

to comply with Local Rule 7056(1)(a) if they wanted to submit a two-page letter and say what the grounds are, and then we would be able to decide that today. We don't think that that can be resolved today. And we suggest that the Court should schedule briefing on the motion to dismiss only, review the papers, and then decide whether it wishes to convert that motion into a motion for summary judgment or not and we would then have a further briefing --

THE COURT: Even --

MR. MILLER: -- schedule.

THE COURT: Even if I were to decide that I want to convert it into a summary judgment motion that wouldn't necessarily mean under 7056 or otherwise that I would have to allow them to do cross-motion --

MR. MILLER: Of course, Your Honor.

THE COURT: -- of summary judgment, right?

MR. MILLER: And that is our precise point, particularly since we don't know what the cross-motion is. If the cross-motion, for example, is on the calculation -- and I will just be -- I won't even have --

THE COURT: Right.

MR. MILLER: -- full disclosure with the Court, we think there are fact issues on the calculation question that is three layers down here. One of the fact issues is we don't have copies of the transfer documents and it's

possible the (indiscernible) transfer documents has some relevance here. So there would have to be discovery to get to a cross-motion on that. A mirror image cross-motion would be a different issue, but they haven't told us anything.

THE COURT: Right. The mirror image cross-motion would be -- would be different, would be for all the reasons they say we win instead of you win.

MR. MILLER: If it's truly --

THE COURT: Right.

MR. MILLER: -- a mirror image, Your Honor.

THE COURT: Okay. Okay.

MR. MILLER: Anyway, Your Honor, that --

THE COURT: All right. Thank you.

MR. MILLER: -- that's the guidance that we seek from the Court today is to --

THE COURT: All right.

MR. MILLER: -- to go forward with briefing on the motion to dismiss.

THE COURT: All right. Thank you, Mr. Miller.

MR. MILLER: Thank you.

MR. BANE: Good morning, Your Honor.

THE COURT: Good morning.

MR. BANE: Mark Bane of Ropes & Gray on behalf of the plaintiffs. I'm a little mystified by the presentation

that counsel made because I had understood that we had reached agreement on all the terms of a scheduling order. We were merely presenting it as a courtesy to the Court to make sure the Court was accepted (sic) the schedule we were presenting. So I'm certainly not in a position today to battle over local rules and this application. That wasn't my understanding as to the purpose of --

THE COURT: How can there be --

MR. BANE: -- this morning.

THE COURT: I'm mystified as to -- that you're mystified.

MR. BANE: We had a draft stipulation on scheduling that we thought was agreeable to both sides and we were appearing today -- this morning to present it on a consensual basis. That's what I'm mystified by. That was my understanding.

THE COURT: Okay.

MR. BANE: So --

THE COURT: Mr. Miller, what -- can you clear the mystification?

MR. MILLER: I would be happy to, Your Honor.

THE COURT: Just -- I'm not -- I'm not accustom to two such experienced practitioners such as yourselves having this kind of a disconnect. So --

MR. MILLER: Well, Your Honor, I would have -- I

have only one copy, but I have a copy of the proposed stipulation that was sent to us yesterday by a colleague of Mr. Bane and it has four paragraphs in it. The first two paragraphs are agreeable and I have recited those. The third paragraph is a briefing schedule on filing a cross-motion for summary judgment from the plaintiffs, and the fourth paragraph is on the reply and responses to that cross-motion.

THE COURT: So --

MR. MILLER: So it's the --

THE COURT: Okay.

MR. MILLER: -- it's the second -- it's the third and --

THE COURT: Okay.

MR. MILLER: -- fourth paragraphs which we said we could not agree to --

THE COURT: Okay.

MR. MILLER: -- and they said, well, we want to do that and we said, we're going to have to talk to the Court about that.

THE COURT: Okay.

MR. MILLER: And so we said, let's go ahead --

THE COURT: All right.

MR. MILLER: -- and talk with the Court.

THE COURT: So here we are.

MR. BANE: Okay, Your Honor. Well, that wasn't our understanding. But be that as it may --

THE COURT: Okay. So here we are.

MR. BANE: I -- just a couple of preliminary comments in response to counselor's summary of where we are.

The motion -- the complaint that was brought was not brought in a vacuum out of the blue. It was brought in the context of discovery being served upon the original sellers of these positions. And the discovery was in order to determine what the cost of funds would be in order to determine what the post-petition interest rate should be.

So when the debtor says that they now believe there should be no payment of post-petition interest because there are set amounts in documents that determine the amount of the claims that should preclude post-petition interest, that seems to be very inconsistent with their issuance of a laundry list of subpoenas upon parties trying to get a determination as to what the post-petition interest should be. So that's number one.

So the first point that's being made by counsel that they believe that there is no entitlement to post-petition interest is a little bit belied by the fact that they were serving discovery to determine what the appropriate rate would be.

Number two --

THE COURT: Well, but where am I supposed to go with that; that Mr. Miller's making it up; that he really is not in good faith proceeding on a motion to dismiss on the grounds that he's outlined?

MR. BANE: Your Honor, I'm just presenting facts. Those are the facts. We work -- the impetus for us to file these subpoena -- this complaint was that you had sellers who have absolutely no interest in these issues any more. They sold their claims. They have no residual interest in the claims.

THE COURT: Okay. So he's --

MR. BANE: The amount -- the amount of what --

THE COURT: So Mr. Miller is saying that he is moving to dismiss first on the grounds that there were releases.

MR. BANE: And I'm just suggesting to Your Honor that that is a position being taken after he subpoenaed a large number of people to determine that.

THE COURT: But what am I -- am I supposed to -- but I don't understand what I'm supposed to do with that statement. Am I then supposed to infer that the motion to dismiss based on the release is frivolous or non-meritorious. I just don't understand the point of your telling me that they took all this discovery and now they've come up with a motion to -- I don't understand the point of

that.

MR. BANE: Okay, Your Honor. When I came here this morning I did not intend to discuss anything that has to do with the merits of the respective positions.

THE COURT: Okay.

MR. BANE: Mr. Miller made it a presentation as to what the position of the debtors are --

THE COURT: Okay.

MR. BANE: -- on the merits, not on the issue before the Court on procedure on a scheduling order. I'm merely commenting on that presentation to the Court. The same question that Your Honor could be asking me, Your Honor could have asked Mr. Miller, why are you presenting to me the merits of your position this morning --

THE COURT: Because the -- he didn't -- he presented the merits in the context of explaining to me that it's the debtors' position that they have a fully dispositive motion to dismiss on two grounds: One, the release and, two, the -- I'll call it the violation of the automatic stay and the step up in the cost of funds. And he gave me the merits in the context -- to enable me to understand why it is that that, as a threshold matter, ought to go first before some as yet to be described cross-motion for summary judgment. I think that that's entirely appropriate.

If you're telling me that on the merits you didn't -- you will disagree that, number one, you're not -- your clients are not precluded by a release and, number two, that there was no violation of the stay, that's delightful and I'll see your papers on that.

So I just don't understand --

MR. BANE: Your Honor had seen Mr. Miller's papers as well and he repeated what was in his papers. I was giving Your Honor a preview as to what would be --

THE COURT: Okay.

MR. BANE: -- in our papers.

THE COURT: What -- what -- okay. Tell me why I shouldn't agree with Mr. Miller that his motion to dismiss on the grounds that he has articulated should go forward without embellishment, cross-motion, et cetera because it seems very logical to me.

MR. BANE: Well, Your Honor, there may be -- first of all, we haven't decided what pleadings to file. We certainly are going to file responses to the motion to dismiss. As we told Mr. Miller and as he reported to you, we have not told him what we have decided with regard to any other issue. Frankly, till I arrived this morning I thought we had agreed on a schedule as I mentioned before.

THE COURT: But that -- but, you see, this is the part that --

MR. BANE: I understand, Your --

THE COURT: But this is the part that doesn't make sense to me. You stood up and you said, I'm mystified. We had a deal. Here's a piece of paper and yet you just said that essentially what you wanted Mr. Miller to agree to was a scheduling order and a briefing schedule on something you hadn't even decided --

MR. BANE: Exactly.

THE COURT: -- what it was going to say.

MR. BANE: And that paper addressed that, Your Honor. The paper said that the amount of time they will have to respond will be dependent on what we file. That unknown was in the agreement --

THE COURT: Well, why --

MR. BANE: -- that we had thought we had reached.

THE COURT: Lawyers aren't -- lawyers aren't really big on agreeing to unknowns. So the rules here are that you have to -- to file a motion for summary judgment, you have to essentially ask under 7056. So why don't you take us all -- let's do away with the mystery. I mean, do you know?

MR. BANE: No. I'm not prepared to do that this morning.

THE COURT: Okay. Then I'm not prepared to depart from the schedule that Mr. Miller has suggested.

MR. BANE: And that's fine, Your Honor. But I would like to reserve my right to make that request.

THE COURT: Of course you --

MR. BANE: And that's fine. I'm not -- as I said before, I did not come here to advocate.

THE COURT: Okay.

MR. BANE: I came here for what I thought was a different purpose. If Your Honor is saying, well, now we know there is no agreement. Let's go forward in the ordinary course subject to your ability to come into court and request, I'm fine --

THE COURT: I just --

MR. BANE: -- with that, Your Honor.

THE COURT: There's nothing else that I would be able to do. I'm not going to order Mr. Miller to abide by a schedule for some mystery motion.

MR. BANE: I agree.

THE COURT: So -- and certainly you have your rights down the road if you believe you have an additional motion, and I'll consider it at that time. But --

MR. BANE: I agree totally, Your Honor.

THE COURT: Okay. Then it was delightful to see you and, Mr. Miller, is there anything else we need to do?

MR. MILLER: No, Your Honor. We'll be happy to submit the proposed order, paragraphs 1 and 2, but not with

paragraphs 3 and 4. I do want to respond to this issue about discovery just so there's not a loose end left on that.

Your Honor, the majority of the post-petition interest claims for some of these debtors have been settled and the plan administration, though, is always interested in settlement. In order to talk settlement, you need to know the cost of funds of the original party. And the fact that there is a release issue and people say, well, I'm -- I want to dispute the release issue. You've got to know what the bookends are.

THE COURT: Right.

MR. MILLER: So the purpose of this discovery was to determine the maximum that we believe could possibly be claimed and then to --

THE COURT: Okay.

MR. MILLER: -- talk about the effect of the releases and the effect of other things --

THE COURT: Okay.

MR. MILLER: -- to go forward. So --

THE COURT: Okay.

MR. MILLER: So that's -- that was 20 -- it was 2004 discovery, so Your Honor recognizes that that can be used to settle claims --

THE COURT: Right.

MR. MILLER: -- as well as to litigate claims.
THE COURT: All right.
MR. MILLER: And so --
THE COURT: Okay.
MR. MILLER: -- we'll be happy to submit to the Court the first two paragraphs of the scheduling order that we've agreed on, and we --
THE COURT: Okay.
MR. MILLER: -- and we won't put in the other two.
THE COURT: All right.
MR. MILLER: Thank you, Your Honor.
THE COURT: Thank you very much. Have a great day.
(Pause)
THE COURT: All right. I think that brings us to MLCS, which I think is the last matter for this morning.
Thank you, folks, for waiting so patiently.
MR. ROLL: It's our pleasure.
Good morning, Your Honor.
THE COURT: Moring.
MR. ROLL: William Roll of Shearman & Sterling, appearing --
THE COURT: Nice to see you.
MR. ROLL: Nice to see you, too, Your Honor. I'm appearing on behalf of Merrill Lynch Capital Services, Inc.,

the defendant in the adversary proceeding that brings us here today. I would note that we've also appeared from time to time in the Chapter 11 cases on behalf of Bank of America, Merrill Lynch as creditor. And in particular in connection with the settlement agreement that I'm sure Your Honor has read about and will hear about in the discussion this morning.

We are here on MC -- MLCS's motion to dismiss the complaint filed by LBSF. I think this is a relatively straight-forward matter as these things go. But with the Court's indulgence I would like to take 60 seconds or so to describe the background and then get into our -- the grounds for our request for dismissal.

As Your Honor probably knows, LBSF asserts six causes of action here: Three each relating to two payments or sets of payments, I should say, alleged to have come Merrill's way as a result of two derivatives trades, two interest rate swaps registered by Merrill to a clearing entity called LCH.Clearnet Limited in June of 2008.

The complaint alleges that those trades were put on by Merrill in error and I'll accept that as true for purposes of this motion. We'll even accept their characterization of them as the erroneous transactions for purposes of this discussion.

The complaint alleges those were put on in error

following the parties having voluntarily and knowingly terminated two trades that did not involve LCH with identical terms, absolutely identical terms two months earlier in April of 2008. Those are referred to as the "similar transactions" in the papers, and I'll use that same terminology this morning.

A couple of important things to note at this point. The similar transactions, the original transactions, the ones that were terminated, were unquestionably done pursuant to a master ISDA agreement from 2001. We refer to that as the original ISDA. That's an important term as we go through this discussion.

Another thing I do want to note is that once the erroneous -- the so-called erroneous transactions were registered with the LCH, whether they were put on in error or not, they were treated as live transactions by LCH following their obtaining consent for that from the two counterparties, Merrill and LBSF.

So even though the complaint -- I'm sorry, not the complaint, the opposition to our motion, and importantly not the complaint itself, but just the opposition to the motion refers to these erroneous transactions as fictitious or counterfeit. They were, in fact, and are, in fact, still live transactions, very real transactions with real economic terms between these parties. In fact, the complaint in

paragraphs 20 -- 19, 20, 21 thereabouts goes through in some detail the economic terms of these supposedly erroneous transactions, the ones they are now calling in their papers the fictitious transactions.

And they admit in the complaint itself that these erroneous transactions mimic the economic terms of the similar transactions. So that's all in the complaint itself.

Once the trades are registered with LCH -- LCH does not facilitate original trades. LCH acts as a clearing entity. So once LCH is involved, it stands between the two former counterparties with each other, and what is created in that circumstance are two separate new contracts. It's, in effect, an ovation. There is a contract between LCH and LBSF on one hand and a contract between LBH and MLCS on the other hand. And payments back and forth go through LCH, go to and from LCH and the respective counterparties. They do not go directly between LCH -- I'm sorry -- MLCS and LBSF.

The complaint, to sum it all up, the complaint seeks the return by Merrill to LBSF of the net amount of payments made to -- made to MLCS under the arrangement I just described between June 2008 and the petition date some three months later.

THE COURT: But let me -- I mean, did -- there's a lot in the papers about erroneous, fictitious, et cetera.

But, in fact, there was no live swap transaction that existed, correct?

MR. ROLL: As of -- well, as of the petition date? Yes, there was. There was a live transaction between MLCS and LCH. There were two live transactions: One between Merrill and LCH and the other between LBSF and LCH. So the two previous bilateral transactions that were terminated were -- and for the sake of argument we'll accept their approach to the facts. They were mistakenly put back on as live trades, but this time through a clearing entity in light of the financial situation that Lehman found itself in in the summer of 2008.

These clearing entities exist for the purpose of eliminating counterparty risk or at least reducing it in a circumstance like that. So Merrill took these trades, mistakenly thought they were live and put them back on through this clearing entity. That clearing entity doesn't facilitate new trades. It just does an ovation that takes each one trade and turns it into two, you know, with two different legs if you will where previously there was just one.

So on the petition date there was, in fact, a live transaction. And there's still a live transaction today involving Merrill. Merrill still hasn't --

THE COURT: I guess I'm making a distinction and

you'll have to indulge me --

MR. ROLL: Sure.

THE COURT: -- because this is -- I have to disagree with your statement at the beginning that this is pretty easy. I don't think it's that easy.

MR. ROLL: Okay.

THE COURT: Okay.

MR. ROLL: Perhaps I was too hopeful.

THE COURT: But was it a live swap transaction?

MR. ROLL: It was a live swap transaction that -- the transaction between LCH and LBSF was live. The transaction between LCH and Merrill was live.

THE COURT: But was it a live swap --

MR. ROLL: Those are live --

THE COURT: -- transaction?

MR. ROLL: -- swap transactions.

THE COURT: Okay.

MR. ROLL: They are, in fact.

So they're asking for monies to come back --

THE COURT: Right.

MR. ROLL: -- monies that came to us as --

THE COURT: Now --

MR. ROLL: Monies flowed through and, you know, sometimes payments made, sometimes payments received by both parties over the course of the three months that these two

transactions were in place before the petition date. The Lehman side was closed out on the petition date and shortly thereafter.

We have now moved to dismiss --

THE COURT: So I'm going to -- I'm just going to stay on this point for a minute.

MR. ROLL: Of course.

THE COURT: So there was a "live swap transaction." Its economics existed.

MR. ROLL: Yes.

THE COURT: But there were no underlying documents reflecting it.

MR. ROLL: The underlying documents reflecting it -- this is hardly an inference, but I think it's the only inference that can be drawn. I say, inference. That's not spelled out in the complaint, but this has to, be based on what is the complaint, this has to be the case; that the live -- that the documents spelling out those terms were the original ISDA, were the terms under the original ISDA that underlay the so-called similar transactions.

THE COURT: The -- right.

MR. ROLL: Yes. So those documents -- and we've attached to our motion the trade confirmations related --

THE COURT: Right.

MR. ROLL: -- to those.

THE COURT: So the -- so that's the answer. The answer is that there were no actual real underlying documents, but you could discern the terms of the transaction by reference to the documents that governed the similar transaction.

MR. ROLL: That's right. And, in fact -- and I don't want to quibble with the term "real" in there, but the -- I think the better way perhaps to look at it, or another way to look at this is that the only way that the plaintiffs could have described the economic terms of the so-called erroneous transactions in the complaint, which they do in depth, would be to --

THE COURT: Is by reference --

MR. ROLL: -- refer to --

THE COURT: -- to the --

MR. ROLL: Exactly. To the --

THE COURT: Okay.

MR. ROLL: -- similar transactions and the terms under the ISDA that underlay those. So --

THE COURT: Okay.

MR. ROLL: So that's the only way it could be done and that's -- that's, in fact, how it happens in the real world. If you put aside the bankruptcy and everything that's happened since September 2008, I mean, the parties would have looked to the terms from the prior transactions

if they were -- if the new ones were intended to replace the old ones, which is what appears to have been the case.

THE COURT: Okay.

MR. ROLL: So --

THE COURT: Okay.

MR. ROLL: So that brings us to where we are today. There's a net amount of something on the order of $20 plus million --

THE COURT: Right.

MR. ROLL: -- that LBSF says should come back. And they've asserted six causes of action, three relating to two different sets of payments, all of them common law based, stated in common law terms.

We have moved to dismiss all of them on the basis -- on three grounds, basically. The first is -- and this is ironic in light of what Mr. Miller was just saying on behalf of the estates a few months ago. First on the basis of the release --

THE COURT: Right.

MR. ROLL: -- granted --

THE COURT: Irony noted.

MR. ROLL: Yes. It's very ironic. The release granted to Merrill in connection with the settlement that Merrill -- that Bank of America and Merrill Lynch reached with the estates in the fall of 2001 with -- or 2011 rather

with respect to all of their derivatives transactions, thousands and thousands of them. And as I'm sure Your Honor knows, it was that settlement with B of A combined with settlements that the estates reached with other major financial institutions that paved the way for the plan to be -- which was then confirmed in late 2012 if I recall correctly.

So our view is that the release given to Merrill in that settlement agreement, in connection with that settlement, bars these claims. That's point one.

Point two, another what I'll structural impediment, structural bar before you even get to the actual words of the complaint, we claim that the -- all these claims, all six of these claims are barred by the safe harbor provision under Section 546(g) of the code. As I'm sure Your Honor knows, that section protects from avoidance actions payments made "under or in connection with any swap agreement" made before the petition date except for those that can be characterized or claim to be actually fraud -- actual fraud-based fraudulent conveyance claims.

So avoidance actions relating to swap transactions are safe harbored under 546(g). We contend that these transactions, the claims that they're making based on these transactions are, in fact, safe harbored because they fit under the terms of the statute even though they speak the

language of common law, you know, state common law claims. Money had and received and unjust enrichment and so forth.

And our third ground for dismissal, somewhat more prosaic, not a structural bar in the same way, is that because these claims are asserting under state law are, in fact, quasi contract claims, they fail because of the existence of an actual contract that governs the subject matter of the claims themselves.

That last, I think, is dealt with pretty adequately in the papers. I'm not going to spend a lot of time on that this morning unless Your Honor wishes me to. I'm going to spend most of my time on the first two on the settlement and the safe harboring.

THE COURT: So let's talk about the release --

MR. ROLL: Okay.

THE COURT: -- because I think that there are circumstances under which a -- the existence of a release would be dispositive on a motion to dismiss, but the papers seem to raise factual issues, seem to raise factual issues regarding the scope of the release and the applicability of the release. And that's what gives me pause because while you say, here's the release. It's plain as the nose on my face that it applies, they say, no it's not.

MR. ROLL: Right.

THE COURT: So I begin to feel very much like I'm

making a factual determination notwithstanding the fact that, yes, there's a release and there are those words.

MR. ROLL: Right.

THE COURT: Because you've got the issues that have been raised with respect to its applicability and also the relating to. Those are --

MR. ROLL: Uh-huh. Right.

THE COURT: And those are separate points.

MR. ROLL: They are separate points and I think, if I'm hearing the Court correctly, the first of those goes to -- and correct me if I'm misstating what Your Honor is getting at -- goes to whether you can even consider -- whether the Court can even consider the release on a motion to dismiss as opposed to summary judgment for --

THE COURT: I think --

MR. ROLL: -- some related point.

THE COURT: Well, I think I can.

MR. ROLL: I think you can, too.

THE COURT: Yeah.

MR. ROLL: Yeah. So I think --

THE COURT: I think I can.

MR. ROLL: Okay. So we're clear. I think we're on the same page.

THE COURT: So I don't think we have to spend much time on that. What I'm more concerned with is the feeling

that I'm deciding disputed issues of fact with respect to the coverage of the release.

MR. ROLL: Okay. I -- let me go right to that.

THE COURT: That's the main -- to be entirely showing all of my cards --

MR. ROLL: Okay.

THE COURT: -- that's my main, my main issue. I have some other questions that I find fascinating about the safe harbor, but my main issue is this feeling that the interpretation and the applicability of the release feels facty (sic) to me.

MR. ROLL: I understand the issue, Your Honor, and let me deal some cards of my own that --

THE COURT: Okay.

MR. ROLL: -- maybe can help fill out Your Honor's hand.

THE COURT: Okay.

MR. ROLL: If I can take the card matter a little further.

Let me start with a point that's actually made by LBSF in their motion papers themselves. And I -- it's an admission and I think it's a dispositive admission --

THE COURT: Okay.

MR. ROLL: -- on this particular point. We do elude to it in our reply papers. Perhaps we could have

highlighted it more. I don't know. I'll highlight it now. They said -- they say, LBSF says the purpose of the release in that settlement agreement was to eliminate controversy, to create peace, to release claims relating to live derivative transactions exist -- actual live derivative transactions existing on the date of the petition. That's what we have based on the conversation that Your Honor and I had earlier. We have a live -- we have two live transactions in existence on the petition date.

So by their own admission, even if it is a facty (sic) kind of determination the Court has to make, that's a dispositive admission that the Court can take into account at this particular stage.

The second thing I would point to is that as -- again, following from the discussion we had earlier, it's absolutely plain from the face of the pleading itself, not requiring Your Honor to make any factual determination, that the erroneous transactions are, in fact, a later incarnation of the similar transactions. They are, in fact, the same transactions economically and have the same impact on the parties as the prior transactions did from an economic and a financial standpoint.

And the similar transactions are mentioned throughout the complaint for the simple reason that they have to do that to set up the existence of these so-called

erroneous transactions because that's where the terms come from.

The reason that's important is that -- is that the similar transactions, and there should be no dispute about this, are, in fact, so-called Lehman transactions in the language of the release. So it should be pretty clear that those were released. It would have been released if they were still alive. Transactions like those were clearly released when the settlement agreement was signed.

The erroneous transactions just need to be -- I guess one other thing. It should be clear that the similar transactions are -- were also released because they were done under so-called Lehman transaction documents or Lehman -- Lehman agreements, I guess. I don't have the exact term in front of me. But the term in the release language itself that goes to the documents creating the agreement.

So there's no question that the similar transactions --

THE COURT: Well, in connection --

MR. ROLL: -- were under that ISDA.

THE COURT: -- in connection with the settlement -- and this might be a very naïve question -- but there was no schedule of any sort called released actions?

MR. ROLL: No. Well, not per se. There was a -- there was -- the settlement was actually part of our motion

papers so Your Honor has the whole thing. And we've all -- we can also refer the Court to the motion by which the estate sought approval of the settlement. It's one of the exhibits to the --

THE COURT: Right. So it's -- the -- it's in here, right, and then there's Exhibit A, remaining bank counterparties.

MR. ROLL: Right.

THE COURT: Right. So that doesn't really help, right?

MR. ROLL: It does not. But there was no -- to get to Your Honor's question, there was -- there was no schedule that said, these are the claims that this agreement releases. The reason for that is that there were thousands and thousands of these transactions.

THE COURT: Right. That's why I knew it was probably a naïve question.

MR. ROLL: Right. So it was -- and that's why -- it's because of that and because of the multitude of transactions that the parties needed to cover that they arrived at the language that they did. And it's -- it's quite broad. It's a very broad release. It says that the estates were releasing all claims now or in the future, known or unknown arising under or related to the asserted Lehman claims, which is a defined term meaning those

embodied in proofs of claim that Merrill and B of A have filed, thousands of those; or arising under or related to Lehman agreement documents, i.e. those arising under ISDAs like the original ISDA. That's why the similar transactions would be covered by this; or arising under or related to Lehman transactions. And so that's the -- that's what picks up things like the similar transactions here.

So it -- I think it's fairly clear just from an examination of that text and taking into account the thousands of transactions that the parties were dealing with at the time that the intent had to be broad. It had to be intended to pick up lots more than what the parties could have, even if they had wanted to, try to put down on a piece of paper that was part of the settlement agreement itself.

So -- and all these connections that I've talked about at this point one can say they are fact-based. They are fact issues. They are facty (sic) to use the Court's term, but they all come up. They all are capable of or susceptible of resolution, if indeed a resolution is required, from the face of the complaint itself, from the face of the --

THE COURT: But you said --

MR. ROLL: -- agreement itself.

THE COURT: -- you said one word that in particular caught my attention which was intent.

MR. ROLL: Correct.

THE COURT: Right. So intent always makes me --

MR. ROLL: And I --

THE COURT: -- really nervous because if you're -- if what they're saying is that the release was not intended -- you're saying the release was intended to cover their claim -- this claim and they're saying that the release was not intended to cover it and there's competing interpretations and, therefore, it's not appropriate on a motion to dismiss.

MR. ROLL: There are competing interpretations for purposes of the advocacy here, but if you really look at the intent, here's what the Court, as a matter of law, I think is entitled to do.

The Court, number one, is entitled to look at their dispositive admission as to what the intent of this was. It was to cover live transactions existing on the petition date. I think, boom, we're done.

The other thing -- another thing the Court can consider with respect to intent is what's apparent from the face of the document itself and the actual words, the four corners of the document as lawyers and law professors like to say. The term related to which we have a host of case law on is interpreted broadly. It has always been interpreted broadly. It's intended to sweep broadly. It's

seen as unforgiving. In one case if I recall it correctly, the Court can look at that and make a determination itself as to what the intent was, and that's pretty standard contractual interpretation stuff if Your Honor will --

The other thing the Court can do is take note of the fact that they have not claimed that that term is ambiguous. They have not claimed that those terms related to are ambiguous. They just say they don't work. That's an important distinction. That's not just a lawyer's or a law professor's distinction. It's important because they would have to convince Your Honor that there was ambiguity in that term in order to get Your Honor to rule, and it's the Court's province, not the -- not anyone else. It's a legal issue that there is ambiguity thus calling for extrinsic evidence to get at the intent.

They haven't shown ambiguity. There's nothing ambiguous about that term at all. It's just a he said she said as to whether it applies or not. That's all they've given Your Honor. They haven't shown ambiguity and I submit they can't. Without their being able to do that, they've got no entitlement to put extrinsic evidence before the Court. It's the extrinsic evidence that would take us into a realm beyond the motion to dismiss.

And I submit, respectfully, Your Honor, we don't have to do that because of their admission, because of the

textual analysis that the Court can do of the document itself, but the host of cases talking about related to language, the host of -- and indicating its broad. The host of cases saying on a related point that when parties release unknown claims, that's going to be enforced. They really should be held to mean that. I mean, that's really part of what they're saying. This was unknown; that they didn't -- you know, if they had known this was going to be put on erroneously, you know, or had been put on erroneously they wouldn't have released it.

But that's -- but the -- I think the lay person's answer to that based on this contract is, even if you accept that the answer is, tough. I mean, they -- they've agreed to release that by the terms of this particular release language and now they have to live with it.

You know, and let's -- since we're talking about a contract here, an agreement, the settlement agreement itself, it's a two-way street. This wasn't something that Merrill or Bank of America was being given for free. Bank of America and Merrill, as the record of these Chapter 11 cases would reflect, gave up what it saw as billions of dollars in claims asserted against the estates in return for, you know, a settlement, in return for, among other things, this particular release and the ability to know going forward that these kinds of things that are coming up

now reflected in this complaint won't come up; that they've been released because the derivatives transactions of all sorts were intended to be released at that point, at the point of the signing of the agreement and the approval of the --

THE COURT: You're --

MR. ROLL: -- agreement by the Court.

THE COURT: You're relying on the related to language.

MR. ROLL: That's correct, Your Honor.

THE COURT: You're relying on the related to language.

MR. ROLL: We are. And -- because it's -- it's also -- well, primarily --

THE COURT: But if it's not -- if it's not an asserted Lehman claim, and if it's not a Lehman agreement document, and if it's not a Lehman transaction, right, if it's not --

MR. ROLL: It's --

THE COURT: -- one of those three, right, but you're saying it's related to it --

MR. ROLL: Well, we --

THE COURT: -- because it -- because of the nexus through similar transactions.

MR. ROLL: I -- I think -- and, again, some of

this is semantics, but if the Court's --

THE COURT: Yeah.

MR. ROLL: -- semantics, I think it is. It is not Lehman-asserted claims because that was intended to mean proof of claim --

THE COURT: Right.

MR. ROLL: -- claims.

THE COURT: Right.

MR. ROLL: But it is the other two. And here's how. It's a Lehman transaction because it is a reincarnation of something -- the similar transactions which were unquestionable Lehman transactions based on these definitions. They arise from the original ISDA.

That's what also makes them, these erroneous transactions claims arising under Lehman agreement documents, the other term that Your Honor mentioned, the second of the three because, again, they relate to the original ISDA which is clearly a Lehman agreement document as the term is defined.

So these transactions, they don't exist in a vacuum and they didn't exist in a vacuum. They existed by reason of the original ISDA which set forth the economic terms, which is itself a Lehman agreement document, and the existed as a Lehman transaction because they were, in fact, as they say -- as they admit they mimicked the economic

terms of the prior transactions.

There's no question that had the original transactions remained alive until the petition date those would have been released. This is essentially the same thing, just in different clothing if you will.

THE COURT: Okay.

MR. ROLL: But they arose from the same genesis. They arose from the same documents and they arose from the same economic bargain that the counterparties made in connection with these transactions. So that -- and that was the -- and that's the way they existed on the petition date.

So I think the -- to come back to a direct answer to Your Honor's question, I think they are, using these terms, they are, in fact, Lehman transactions and they are, in fact, based on Lehman agreement documents.

THE COURT: Okay.

MR. ROLL: And they are also related to in a broader sense.

So, you know, maybe it's not as straightforward as I might have thought, but I think it's -- it is nevertheless relatively clear that the complaint itself, the allegations made in the complaint, statements made by LBSF in their motion papers, their opposition to the motion, they make it clear that the intent here is something Your Honor can decide for -- the Court can decide for itself without

resorting to any extrinsic evidence, and that the Court can readily find that these transactions, just based on what's been alleged, arise, you know, from documents and transactions that are clearly covered by the release.

THE COURT: Okay.

MR. ROLL: So --

THE COURT: All right. I think --

MR. ROLL: -- that's the release.

THE COURT: I think with respect to the 546(g) I don't think I need anything further on that.

MR. ROLL: I'm sorry. You --

THE COURT: I don't need to hear you on the 546.

MR. ROLL: On the 546. Okay.

THE COURT: Yes.

MR. ROLL: Then I think that's it.

THE COURT: Thank you.

MR. ROLL: I will sit down. Thank you, Your Honor.

MR. MAHER: Your Honor, Bill Maher on behalf of Lehman Brothers Special Financing, Inc.

THE COURT: So Mr. Roll is very persuasive.

MR. MAHER: Yes. He's very persuasive if you make his assumptions and inferences and factual assumptions and leaps he's very persuasive. But this is a motion to dismiss based upon the statements that are contained in the

complaint, not as he would like them, but as they are. And there are two important points that I want to make to you, Your Honor, about factual misstatements that Merrill Lynch has made both in the reply brief and here today before you.

THE COURT: Okay.

MR. MAHER: And I think it's outcome determinative with respect to those issues.

First of all, they say that the erroneous transactions are genuine contracts and that we've --

THE COURT: Well, I --

MR. MAHER: -- changed --

THE COURT: -- I went through this a number of times. So I said the answer is that they are -- that they dispute that they're fictitious and they say that they are live; that they were live swap transactions.

MR. MAHER: And we dispute that.

THE COURT: Okay.

MR. MAHER: And that's the fact issue, Your Honor, that he is assuming. That is not alleged in the complaint. What is alleged in the complaint in paragraph 2 is that in June 2008 Merrill, MLCS erroneously identifying two non-existent interest rate swaps, which we have -- which we define as the erroneous transactions.

In paragraph 15 we allege no original contracts existed for the erroneous transactions. We are at -- so we

are saying and have said all along that the transactions are fictitious. They are counterfeit. They are not bona fide.

Counsel is telling you they are genuine. They are legitimate. Your Honor, that is a basic factual dispute that cannot be resolved by the Court on a motion to dismiss. Our allegations are that they are counterfeit and not genuine. They are saying they are. That's a basic actual dispute that you cannot resolve. This issue abounds with fact issues. What we really need to do, Your Honor, is find out what happened here, take the discovery --

THE COURT: But --

MR. MAHER: -- present it to you --

THE COURT: But the -- they're not fictitious in the Bernie Madoff sense, right? They're not fictitious in the sense that there was actually nothing that occurred.

MR. MAHER: Correct.

THE COURT: Right?

MR. MAHER: Yes.

THE COURT: There was -- there fictitious in the sense of -- or they're erroneous in the sense that -- how can I try to explain this? Somebody pushed a button twice when they should have only pushed it once and generated a second transaction that had the terms of the first transaction. So it -- there -- so --

MR. MAHER: Maybe.

THE COURT: When you say fictitious I think Bernie Madoff.

MR. MAHER: Okay.

THE COURT: Completely made up, no darn cat, no darn cradle, right, to quote (indiscernible). Okay. There was just nothing there. There -- what Mr. Roll was telling me is that they had their genesis in an error, but they actually -- there was economic substance and, therefore, they then became live and actual --

MR. MAHER: That's what he's saying.

THE COURT: -- as opposed to fictitious.

MR. MAHER: That's what he's saying.

THE COURT: That is what he's saying.

MR. MAHER: And there's no facts to support that. That's all invented in his head. What we have are two transactions, the similar transactions, that were terminated by mutual agreement in April of 2008. Then we have invented fictitious transactions created by Merrill Lynch that were sought to be connected to the London Clearinghouse LCH. Thereafter, things happened as a result of that that resulted in --

THE COURT: Right.

MR. MAHER: -- $21 million of Lehman's money being given to Merrill Lynch. That doesn't mean his suppositions about what might have happened and what went forward is

correct. They are disputed. They are unknown, Your Honor. Nobody really knows what happened here. And what we need to do is figure out what happened here, bring it to you as a factual record for you to make a determination as a matter of law based upon a full factual record what happened here.

The second point I want to make to you, Your Honor, with respect to what I think was a clear misstatement by counsel and he -- he even called it the dispositive admission --

THE COURT: Right.

MR. MAHER: -- that we made.

THE COURT: Talk about the dispositive admission.

MR. MAHER: All right. That relates to Exhibit D to the motion which is the termination and settlement agreement. That's the operative document that he wants you to consider. And he misstated what we stated about that document.

The termination and settlement agreement, Your Honor -- and it's a termination and settlement agreement, it resolved claims between Lehman Brothers and Merrill Lynch, direct transactions between Lehman Brothers and Merrill Lynch that were live as of September 15th, 2008.

If you look in the preamble the parties to the agreement are the Merrill counterparties and the Lehman entities, and they're all defined as parties. Note who is

not included as a party, LCH or any other intermediary.

Counsel stated to you that the erroneous transactions were alive on September 15, 2008 and, therefore, are covered by this document. They are not. Only direct dealings between Merrill Lynch and Lehman Brothers are covered by this agreement.

There's a second caveat. Only agreements that were live between Merrill and Lehman Brothers as of September 15th, 2008, the petition date, are covered by this agreement. How do we know that? It says on page 3, the first whereas clause, "Whereas the Merrill counterparties and the Lehman entities acknowledge the termination of their respective Lehman transactions to which they were a party under the applicable Lehman agreement documents on September 15, 2008."

And then we go forward about an allowed valuation and framework for that. If you read this document, Your Honor, the entire agreement is about valuing within the framework that Lehman is applying to all the bank counterparties the claims that Merrill Lynch has, direct claims between Lehman and Merrill live on September 15th, 2008 to determine a framework value and an ultimate resolution of those claims.

What does -- and I want to talk about Exhibit A in a minute, but what does that mean? That means that the

erroneous transactions are not part of this termination and settlement agreement despite what counsel says. It all --

THE COURT: Because LCH is not a party.

MR. MAHER: Exactly. And there -- all the things that are referred to as the proofs of claim --

THE COURT: Mr. Roll, if you're keeping track that's a good one that you're going to have to address when you stand up.

MR. ROLL: Okay. That LCH is not a party.

THE COURT: Yes.

MR. MAHER: And this relates to proofs of claim asserted by Merrill entities against Lehman, not LCH. LCH had nothing --

THE COURT: So --

MR. MAHER: -- to do with this agreement.

THE COURT: So I think -- so not to steal Mr. Roll's thunder, but I think what he might tell me is that, well, that's all well and good, but there's that related to language.

MR. MAHER: I get that, Your Honor. My point is that this agreement has nothing to do with the erroneous transactions. He said the dispositive admission I made is that if the LCH transactions were live on the settlement -- on the petition date, that they were, therefore, covered by this document and released. They're not. He's totally

wrong about that. And if you read the document you will get that.

If you go to Exhibit A, Exhibit A, the first page of Exhibit A refers to counterparties and valuation issues. And if you look down on the second line, Your Honor, there's -- the bank is Merrill Lynch. The counterparty is Merrill Lynch Capital Services. The debtor is LBSF. The asserted claims are an amount stated which relate to the claims that were submitted in proofs of claims by Merrill Lynch. Then there is a framework value which is less and then there is a contract ID and contract date which refers to the ISDA document.

This is all about settling claims between -- direct claims between Merrill Lynch and Lehman Brothers. That has nothing to do with the erroneous transactions or them being live or not live on September 15, 2008. This agreement has no bearing on that.

Also, his second point was that the similar transactions are covered by this agreement. They are not. They are not live on September 15, 2008. They were terminated in April of 2008. And, therefore, there was no proof of claim submitted by Lehman with respect to that if we ultimately get to the facts of this matter.

So he is trying to claim that the erroneous transactions are covered by this document and the similar

agreements are covered by this document. Neither is true. Neither is true. What he is saying is if you pull out the definition of Lehman transactions and Lehman agreement documents in the first recital --

THE COURT: Right.

MR. MAHER: -- and look at nothing else in this agreement, just look at that, telescope in on that, that he can somehow fit the similar transactions into being a Lehman transaction or a Lehman agreement document and, therefore, not have to deal with the rest of this document which says it had to be live on September 15, 2008 for this -- any of this to be applicable.

THE COURT: It had to be live as between LBSF on the one hand and Merrill on the other.

MR. MAHER: Exactly. That's why the erroneous transactions involving LCH is a complete red herring and has nothing to do with this document. Once you understand those realities, his argument completely falls away and has zero merit. It is, in fact, a misleading argument.

Turning if I could to the merits of the legal argument on the complaint and their motion to dismiss addressing the release, Your Honor, I understand that you're inclined to consider the release on a motion to dismiss. I will tell you the distinction between what was referred to as the ironic distinction between Lehman being up here in

the prior case saying you should consider a settlement agreement on a motion to dismiss. The distinction, Your Honor, is very important. In that case the pleading specifically referenced the settlement agreement and, therefore, under clear law the Chambers v. Time Warner case, it is deemed incorporated into the complaint and you can consider it on a motion to dismiss.

That's not the situation here. There's no way under traditional analysis under the Second Circuit's controlling decision in Chambers v. Time Warner that you can consider the motion -- the settlement agreement on a motion to dismiss because it's not referenced in, it's not incorporated in, it's not attached to the pleading.

What they say is you can take judicial notice of it. And there's a dispute about that. I understand you're inclined to do that, Your Honor. But you did say --

THE COURT: Well, I don't -- don't read too much into what I said. I'm still --

MR. MAHER: All of their cases, all of their cases deal with courts being frustrated by recidivate litigants and prisoners who are repeatedly litigating, litigating and they've signed releases, or a class action opt-out party where there's a class action settlement and they're asserting new claims. They're saying, well, I'm just going to take judicial notice of the general release.

And there are cases that do say that, Your Honor. But all of them, not one of their cases I'm aware of is a narrow limited release which they're asking you to construe in the guise of giving judicial notice to it on a motion to dismiss.

THE COURT: So isn't it the same thing as if they had moved for summary judgment on the release point?

MR. MAHER: Yes, except we would be entitled to discovery before they did that. And I would like to know a whole host of things about what happened here and the scope of what the parties knew or didn't know and what was intended by this thing before you would be able to rule on that motion, Your Honor.

But that's my point is we should bring that -- we should collect that factual record. We should bring that factual record to you so you can ultimately make the determination.

One further point on the release, Your Honor, they have not cited a single case that says, assuming that you take judicial notice of the settlement agreement, the termination and settlement agreement and, therefore, interpret the scope of it, there's no document -- no case that they have given you that says, it's appropriate to interpret a narrow release under the guise of judicial notice on a motion to dismiss. We've cited two --

THE COURT: Well, I think what they're saying is that I can read and it says what it says and there's no legitimate factual or legal issue that it's -- but that it covers the erroneous transactions.

MR. MAHER: Right.

THE COURT: And what you're saying is -- and what I said to Mr. Roll was that I feel like there are any number of facts that are baked into that determination --

MR. MAHER: Exactly, Your Honor. Whenever you talk about something is connected to and something is related to, it is very fact-oriented, fact-specific as Your Honor's initial instinct was. You cannot decide what is or isn't related to without taking into account the context of what's going on. And what I'm telling you is this agreement has nothing to do with the LCH transactions. This agreement has nothing to do with the similar transactions. So how can something that is fictitious be related to something that has nothing to do with these categories?

They admit that the erroneous transactions do not fall within the Lehman asserted claims which are the claims that were proofs of claims that were asserted doesn't fit within the Lehman transactions or the Lehman agreement documents --

THE COURT: Well, they say that it does.

MR. MAHER: No. No. They say that it does only

because of the similar transactions.

THE COURT: Correct. That's exactly right.

MR. MAHER: No. No. But they're not saying the fictitious -- the erroneous transactions do, Your Honor. They're not saying that there is any ISDA that relates to that. They're not saying that there's any --

THE COURT: They're saying --

MR. MAHER: -- trade documents --

THE COURT: -- that there's an ISDA -- that they're saying that the nexus is through the similar transactions because --

MR. MAHER: And --

THE COURT: -- the erroneous transactions mimic or follow the --

MR. MAHER: Right.

THE COURT: -- terms of the similar transactions that, therefore, they fit within the -- those two latter categories.

MR. MAHER: Right. And in order to make that determination, what counsel has told you is, in their papers and here, they are the same trades. What factual record do you have to make a determination that they're the same trades, Your Honor? We've alleged to the contrary. We have alleged that they're new trades. They happen to have the same terms, but they're new trades. They're saying they're

the same trades; that they're just the reinstated by mistake same trades. We don't know that. You don't know that. Nobody knows that. You can't know it on a motion to dismiss.

So his talk about related to, it's none of these categories. It's related to because the similar transactions are Lehman transactions or Lehman agreement documents, according to him, which I disagree with.

And then he's saying, take the leap and say the erroneous transactions are really the similar transactions and, therefore, collapse it all together, Judge, no discovery, no figuring out what happened here factually, that's the end of the story. You can't do that on a motion to dismiss, Judge. And that's essentially why you said and came out here and said the interpretation and applicability of the release seems facty (sic). It does because it is.

THE COURT: Okay. Let me hear from Mr. Roll.

Thank you.

By the way, I know that facty (sic) is not a word.

(Laughter)

MR. ROLL: Although I -- I've adopted it.

THE COURT: It's a good word, right?

MR. ROLL: It's a very good word. I love it.

Let me just assure Mr. Maher that with respect to his statement that these things came just out of my head, I

can assure him I'm not that clever. None of this came out of my head. It came out of my reading of their pleadings and their opposition papers.

LCH, he mentioned LCH. Your Honor asked me to address LCH. As I -- and I'm happy to do that. As I listened to Mr. Maher's presentation it's clear their complaint relates to their separate new transaction, erroneous or not, with LCH. LCH is not here. LCH was not named as a party. That's not our fault. They could have named them. And if they're saying that LCH -- that the only thing that stands between them and recovery is getting at that LCH transaction, then LCH is an indispensable party that should have been named.

What he's basically saying is they have a problem because they made payments to LCH and those weren't released.

THE COURT: No. That's not what he's saying. He's saying that the settlement agreement on which you base your argument settles claims between -- settles trades between -- live trades --

MR. ROLL: Right.

THE COURT: -- between LBSF on the one hand and MLCS or other Merrill parties on the other hand, and LCH is not a party to that agreement so, therefore, since the erroneous transaction involved LCH, it could not have been

released.

MR. ROLL: Then -- and maybe this is a better way for me to have stated it --

THE COURT: Yeah.

MR. ROLL: -- coming up. Then the remedy is not to sue us. It's to seek rescission of their agreement, that leg of the notated transaction that constitutes their agreement with LCH. They didn't do that. They still have -- they have until the petition date a live transaction with LCH. We had a live transaction with LCH, too. It still exists, by the way. We're still on the hook.

So for us to be giving them money, which is what they're asking for and still be on the hook to our counterparty in the face of a live transaction today is also, you know, an equitable point that ought to be considered. I don't mean to digress, but it -- this point about LCH, it's a lot of --

THE COURT: So isn't that -- I'm a little perplexed. Might not you bring in LCH as a third party defendant?

MR. ROLL: Why would we? We're -- we don't have a beef with LCH. They're the ones who have a beef with LCH. What they're --

THE COURT: Okay.

MR. ROLL: -- complaining about is they gave money

to LCH and they're alleging LCH gave it to us improperly. And, you know, monies went back and forth between --

THE COURT: Right.

MR. ROLL: -- those two legs a lot. They're asking for the net amount given to us --

THE COURT: Right.

MR. ROLL: -- by LCH. That's not money they gave to us. It's money they gave to LCH. We have no complaint with LCH. We still have a live agreement with them. They don't. But they say they're owed money. They should have sought to rescind that agreement instead of suing us. Who knows if they still can. I don't know.

I think the -- I think that -- the Lehman portfolio was sold by LCH to a third party. So there's probably some third party out there, some counterparty they could go after. But that's not -- that's not our concern.

Without LCH here, based on what he said, they ought to be dismissed for failure to join an indispensable party.

THE COURT: That's not your --

MR. ROLL: So they --

THE COURT: That's not your motion.

MR. ROLL: That's not our motion. But I'm saying based on what he's saying, he's creating a whole host of other problems for them. I'm saying we don't even have to

get to that because since they have sued us I do think a fair reading of the release language in the agreement does encompass these trades. It does show an intent to cover these trades because they do mimic the terms of the -- to use their words of the prior transactions.

And, you know, he says they -- there were no live trades as of the petition date. Their complaint describes in great detail, in paragraphs 19, 20 and 21, what the economic terms were. And millions of dollars in cash moved back and forth because of these live transactions on the petition date. And it happened to be that LCH was their counterparty by reason of --

THE COURT: Right. But the settlement agreement covers transactions that were live between the parties to the settlement agreement which is not LCH.

MR. ROLL: And it covers -- well, the release --

THE COURT: And related to.

MR. ROLL: And related to. And I'm not trying to back away from that. And related to. These are clearly related to. The only way they can tell the story about the erroneous transactions is by telling a story about the related transactions, the similar transactions which supplied -- which were the only source of economic terms for any of these transactions.

So all I'm saying -- but it should be sufficient,

I think, is that the intent of the parties apparent from that broad language, it was to cover something like this in terms of a claim against Merrill.

Separately, if they have a complaint about the transaction, the contract they had going with LCH at the time of the petition, their remedy was rescission against that party, not a claim against us.

With -- if -- and I could say more on that if Your Honor wishes or I can go to the judicial notice point because Mr. Maher did talk about that. I do want to make plain that this court clearly can take judicial notice of the settlement agreement. The cases that Mr. Maher referred to as casting some doubt on that all involve situations where the Court had to engage in some inquiry with respect to whether the document in question was authentic, whether parties had performed other parts of it, things like that. There were facty (sic) kinds of issues with respect to those.

In this case -- and -- or to put it differently, but to put it in somewhat more legal terms, they failed the test for judicial notice under Federal Rule of Evidence 201. That rule, which we haven't heard anything about yet, but it governs this ultimately, says a Court may take judicial notice of facts readily ascertainable and that are not -- that are not fairly in dispute.

In this circumstance we have a document that meets that test because it's clear on its face that it's authentic. It was approved by this Court. It says what it says, and the only issue is not performance there under or any aspect of the settlement --

THE COURT: It's applicability.

MR. ROLL: It's applicability. And that's a pure legal question.

So judicial notice, I think Mr. Maher used the words, the Courts were frustrated in those other circumstances. They were frustrated because the documents they were being asked to notice judicially were not Federal Rule of Evidence 201 worthy. They were not -- they were not without some dispute as to their underlying content or their underlying authenticity. Here we don't have that at all.

I would also note, and this is not insignificant. It does pay to look at these rules once in a while. Federal Rule of Evidence 201 also says that the Court may take judicial notice of a fact that's otherwise noticeable at any time, at any time, which to me encompasses the 12(b)(6) context wherein it doesn't require summary judgment.

And it also says that if the Court is presented with the materials to take judicial notice of a fact that meets the standard, I was actually surprised to be reminded of this, the rule says the Court must take judicial notice

of it.

So I --

THE COURT: Well, I had -- I don't have any issue with the concept of taking judicial notice of a settlement agreement entered in connection with the case.

But I do feel that to grant the motion to dismiss here would be to engage in fact-finding and I do not believe that that would be appropriate. There was a recent case in Residential Capital in which for the first time in eight years Judge Glenn was reversed in circumstances that were not entirely dissimilar to those here that caused me to really think about what it means to grant a motion to dismiss.

And here I think, at least for the last hour, you've heard a lot from me about issues that I have identified that I believe do -- would require me to make some factual determinations and, therefore, preclude my granting the motion to dismiss.

That being said it may well be perhaps the complaint could have been pleaded a little differently or a little better. Perhaps there's an additional motion to dismiss that you have. I don't know what's going to happen next. But the motion to dismiss that's before me I'm denying.

MR. ROLL: All right. Your Honor, I saw what

happened when counsel in a prior case continued to speak after the Court had ruled and I'm not going to make that same mistake. So --

THE COURT: All right.

MR. ROLL: -- I will simply say thank you.

THE COURT: Thank you very much.

MR. ROLL: Thank you, Your Honor, for your time.

THE COURT: Your arguments were very thoughtful and I appreciate all your preparation and hard work.

MR. ROLL: Thank you, Your Honor.

THE COURT: Will you share an order with each other?

MR. MAHER: Yes, Your Honor.

THE COURT: All right.

MR. MAHER: Thank you very much, Your Honor.

THE COURT: Thank you.

I think that concludes the calendar this morning.

Thank you.

(Recess taken at 12:25 p.m.; resume at 2:08 p.m.)

THE COURT: Familiar faces on both sides today. How are you folks. Good afternoon

ALL: Good afternoon.

THE COURT: All right. I'm ready when you are. A familiar face sitting back there too, how are you, Mr. Neier?

MR. NAIER: Good afternoon, Your Honor.

MR. REINTHALER: Your Honor, Richard Reinthaler from Winston and Strawn on behalf of the Defendants, AmeriCredit Financial Services, Inc., AmeriCredit Automobile Receivables Trust 2007 BF, and AmeriCredit Automobile Receivables Trust 2007 DF. As we mentioned in our papers, we're not here on behalf of the 2005 Trust, which is no longer in existence.

With me today is Evan Koster from Hogan and Lovells who is co-counsel, and my partners David Neier who you know and John Schreiber.

We're here today, Your Honor, on a case six years after the events in question took place, filed by two Lehman entities that have been in and out of bankruptcy against three auto loan securitization trusts that no longer exist for all intents and purposes, and their sponsor and servicer AmeriCredit.

Lehman seeks a judgment requiring the defendants to pay money they never received. When following Lehman's bankruptcy, they were forced to terminate six interest rate swaps and scrambled to find a ready, willing, and able replacement counter party which was not an easy task in those chaotic days.

Lehman, although it had the right to replace itself, didn't do anything at the time to offer its

assistance. It accepted the money that was tendered to it, and then sued us two and a half years later, which was the first time anyone knew that there was a problem.

This is at bottom a case of contract interpretation. It's a complicated contract, and it involves multiple documents, but the principles of contract construction are relatively straight forward, and we've laid them out in our briefs. But very briefly, these contracts, these three documents for the 2007 Trusts and for the 2005 Trust, they have to be read as a whole.

The terms of the contracts have to be harmonized wherever possible to avoid inconsistencies, and to try to give meaning to all of the terms. The Courts thus have a duty to reconcile terms that may at first glance appear inconsistent to avoid rendering any clause superfluous or meaningless.

And they have a duty to avoid interpreting a contract in a manner that would be absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties.

Now, Lehman doesn't really quarrel with those principles of contract interpretation but argues that the inclusion of a tiebreaker clause, which is their term, in the 2007 swap agreements trumps them all. Our position is that it doesn't trump anything. The tiebreaker clause only

comes into play when all of the other rules of contract interpretation are not of assistance to the Court in reconciling a conflict.

You only break the tie when there is a tie, and as I shall explain, and as we explained in our papers, there is no irreconcilable conflict here in the language.

Now, we have different language for the 2007 swaps and for the 2005 swap. And if -- with Your Honor's permission, I'm going to deal with the 2007 swaps first --

THE COURT: Okay.

MR. REINTHALER: -- because that's where the real money lies.

And again, with Your Honor's permission, I have brought with me a set of the swap agreements --

THE COURT: So did we.

MR. REINTHALER: A thin set.

THE COURT: A -- okay.

MR. REINTHALER: That is yellow highlighted with all of the language that both sides have cited.

THE COURT: Perfect.

MR. REINTHALER: To make it easier for you.

THE COURT: Read my mind.

MR. REINTHALER: Mr. Schreiber. And we also have two other documents, one is an early termination timeline, which has all the relevant dates --

THE COURT: And Mr. Cohen has the benefit of all of these?

MR. COHEN: Not yet.

MR. REINTHALER: Yes. Give him one.

MR. COHEN: Thank you.

THE COURT: Thank you.

MR. REINTHALER: So one of them is an early termination timeline which is the heading on it, which is just the relevant dates that events occurred here.

THE COURT: Okay.

MR. REINTHALER: And the other two sheets are decision treaties, one under the 2007 swaps and one under the 2005 swap which lay out, in our view, the way in which those agreements are to be read in the context, in either a default by AmeriCredit --

THE COURT: Okay.

MR. REINTHALER: -- or a default by Lehman.

THE COURT: And now we've got the ISDAs. All right.

MR. REINTHALER: Everything starts with the 2007 ISDA master agreement, and which is a preprinted standard form and you should have that in front of you, Your Honor.

THE COURT: Okay.

MR. REINTHALER: The key provisions in the ISDA master agreement are found in Sections 5, 6 and 14. Section

5, and I don't think there's any dispute here, in Section 5 it provides for events of default.

And Section 5(a)(7)(i)(IV) which is on page 6 of what I handed out, says "That as an event of default where the party," which in this case is LBSF, "institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or a similar law and in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition B) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution of or presentation thereof."

So the event of default provision that was cited by AmeriCredit here in its notice of early termination provided for a 30 day cure period. Which meant that the earliest date on which AmeriCredit could have declared an event of default is October 15, 2008.

Now, we got to Section 6. Section 6(a) of the ISDA master agreement begins with "If at any time an event of default with respect to a party, the defaulting party has occurred and is then continuing the other party, the non-defaulting party may," says may, "by not more than 20 days' notice to the defaulting party specify in the relevant event of default, designate a day not earlier than the day such

notice is effective as an early termination date in respect out of all outstanding transactions."

So under the language I just read, termination is not automatic, it's optional. And the non-defaulting party here, AmeriCredit may at any time following that event of default send a notice to the defaulting party, Lehman, designating an early termination date, which may be as early as the date of the notice, or as late as the day 20 days thereafter. So there's a 20-day window there.

In this case, it's undisputed that AmeriCredit sent that notice to Lehman on November 20th. And it also designated that day and not a later day as the early termination date.

We then go to Section 6(d). In Section 6(d) which is entitled calculations it says, "On or as soon as reasonably practical following the occurrence of an early termination date," so that's on or as soon as practical after November 20 in this case, each party will make the calculations on its part contemplated by Section 6(c) and provide to the other party a statement laying it all out.

It's undisputed again in this case, Your Honor, that AmeriCredit performed that calculation and provided it to Lehman on November 21, the following day.

You then move to Section 6(d). Section 6(d) is entitled payments on early termination. And it states that

the party shall determine the amount payable pursuant to a payment measure, which is either market quotation or loss, and a payment method either the first method or the second method specified in the schedules.

Here, again it's undisputed that the parties in part 1(c) of the schedules for both the 2007 and the 2005 swaps elected the second method and market quotation as the default process to be used.

This then takes us to the definitions, and if you turn to Section 14, the definition of market quotation on the bottom of page 15 and the definition of loss, which is above that, on their face, these definitions apply regardless of who the defaulting party is.

Market quotation means with respect to one or more terminated transactions, an amount determined on the basis of quotations from reference market makers, and reference market makers is defined on the following page to mean four leading dealers in the relevant market having the highest credit rating.

So you need to seek market quotations from at least four reference market makers. Each quotation will be for an amount, if any, that would be paid to such party in consideration of an agreement between such party and the quoting reference market maker to enter into a transaction defined to be the replacement transaction which is an

important definition, that would have the effect of preserving for such party the economic equivalent of any payment or delivery that would but for the occurrence of the relevant early termination date have been required after that date.

So it's clear that Section 6(e) of the ISDA master agreement under the definition of market quotation that I just read would have required had it applied in the context of the 2007 swaps, would've required AmeriCredit to have sought market quotations from at least four referenced market makers for what I will call an apples to apples replacement transaction, which in this case, is a guaranteed balance swap, as opposed to another type of swap.

The definition of market quotation then goes on to tell you how to determine the amount payable based on the number of quotations that you receive. If you receive three, two, or fewer than three, then you're relegated to the loss method, and that's relevant here, Your Honor, only with respect to the 2005 swap because there, there were less -- fewer than three market quotations that were received. And I think everyone agrees that the loss method applied to the 2005 swap, so we'll get back to that later.

You next need to then go to the definition of settlement amount, which is on the bottom of page 16, and that's defined to mean, and I'm going to paraphrase, it's

essentially the amount payable either by or to the replacement counterparty under the market quotation method in our case.

So again, it's tied to an apples to apples replacement transaction. And all of this makes perfect sense because it equates replacement and settlement values. And that is important for trusts like the AFS Trust which are bankruptcy remote vehicles, they have no assets, no recourse, and therefore, they need to have this match.

Now, we go to the schedules. If you'd turn to the schedules for the 2007 swap, Part 1(k) of the schedules is the key, which begins on the bottom of page 4 and carries over to page 6. Unlike the ISDA master agreement, the schedules for the 2007 swaps are not preprinted forms. They are arm's length negotiated agreements.

Here I want to highlight or focus on the highlighted language in Part 1(k) in which the parties rewrote the process set forth in Section 6 of the ISDA master agreement that we just went through for determining the amount payable upon an early termination, but only where Lehman was the defaulting party.

And I don't think Part 1(k) could be any clearer about this, because it begins with "notwithstanding Section 6 of this agreement, for so long as party A which is Lehman is the sole affected party or B, the defaulting party in

respect of any event of default."

So as long as Lehman is the defaulting party in respect to an event of default the following shall apply.

It then goes on in subparagraphs (i) and (ii) to delete in their entirety and replace the definitions of market quotation and settlement amount. It deletes --

THE COURT: Hold on. Hold on one second.

MR. REINTHALER: Yes.

THE COURT: Okay. Go ahead.

MR. REINTHALER: Okay?

THE COURT: Yep.

MR. REINTHALER: What it does, is it says that the definitions of market quotation shall be deleted in its entirety and replaced with the following. It doesn't amend the definitions, it deletes them and replaces them in this document with new definitions.

And the new definition of market quotations set forth below says, "Where Lehman is the defaulting party, instead of requiring quotes from four leading reference market makers for an apples to apples replacement transaction, all it requires instead is that AFC or AmeriCredit obtain a single firm offer," which is a defined term, which is defined on page 11 in part 5(b)(iv)(D) on page 12. I'm sorry, it's on page 12, not page 11. To be an offer which when made was capable of becoming legally

binding upon acceptance.

So going back to the new definition of market quotation, it requires AmeriCredit to obtain a single firm offer for a replacement transaction. In other words, an apples to apples guaranteed balance (indiscernible).

And if you go then to the new definition of settlement amount, which is in (ii) again it deletes the definition in its entirety and replaces it with an entirely new definition that says, "The amount of any market quotation for the relevant terminated transaction that is accepted by party B," which is AmeriCredit, "so as to become legally binding."

So, in other words, the settlement amount is the amount of the firm offer that is actually accepted by AmeriCredit for an apples to apples replacement transaction. And those latter words, accepted, it has to be accepted are very important, because it deals with one of Lehman's arguments that I'll get to.

THE COURT: Well, so there's no option to not accept.

MR. REINTHALER: There is an option not to accept it. Because if you don't get a firm offer and haven't accepted a firm offer by the early termination date, the agreement goes on to explain what happens.

THE COURT: Okay.

MR. REINTHALER: That didn't happen here. There was a firm offer, it was accepted on the early termination date, so we don't need to get into subparagraphs A and B on page 5 in the definition of settlement amount, which talk about how you deal with it in other circumstances.

THE COURT: Okay.

MR. REINTHALER: And again, just like the definitions in the ISDA master agreement where Lehman was the defaulting party, the process that I just described for market quotation with a single firm offer for an apples to apples replacement makes perfect economic sense, because we have to replace the swaps when Lehman defaults; otherwise, there would've been a default under our own notes to our own noteholders. They had financial ratings that had to be maintained in order to avoid defaults. So you had to have a reputable swap counterparty, and you have financial guarantors that are sitting there and they're exercising rights of control and looking over your shoulder and making sure that you have hedged completely your interest rate risk.

THE COURT: Just pause --

MR. REINTHALER: Okay.

THE COURT: -- for one second. Help me out with respect to just the mechanics and the economic incentives or factors that may come to bear when you're in the single firm

offer mode as opposed to the three or four market quotation mode.

In other words, and this might be a naïve or a dumb question, but you all indulge me. If you're in -- what are the motivations of the party to elicit a firm offer that are more favorable to it and less favorable to the defaulting party or at -- if that's a nonsensical question --

MR. REINTHALER: It -- no, it's not nonsensical. There is no incentive. AmeriCredit doesn't have an incentive to get a higher or lower bid. It's the same no matter what, because the economic terms of the swap are required to be essentially the same as the swap that's replacing it.

THE COURT: Right. But in the other scenario where you're getting different market quotations, right, and the settlement amount is arrived at as a result of those --

MR. REINTHALER: Uh-huh.

THE COURT: -- in that, presumably, there are different numbers.

MR. REINTHALER: Right.

THE COURT: So what I'm -- so against the back drop of their being a requirement of getting a single firm offer, are you picking one and making that a firm offer when you have other choices?

MR. REINTHALER: You can. You can.

THE COURT: But you're --

MR. REINTHALER: The -- I think I understand the source of the question. And it does require some understanding of why the language changed --

THE COURT: Okay.

MR. REINTHALER: -- okay. The language in these agreements changed in 2006 and 2007 which is why we don't have this issue with the 2005 swap. And it was changed and all you have to do is read what we've cited in our brief, which is Moody's guidelines for swap agreements, and they've explained -- they're trying to make it easier for non-defaulting parties to replace the swaps.

So instead of requiring them to go out and get four, they're saying, if you can only get -- you only need to get one instead of four, so you don't have the problems with averaging, we're trying to eliminate the disputes that exist. We're trying to make it easier for the non-defaulting party to replace because --

THE COURT: So what I'm focusing on is, okay, I get that, that makes perfect sense.

MR. REINTHALER: Uh-huh.

THE COURT: But then there you are, lo and behold, look, there are two market quotations that are out there, and you only have to -- under the ISDA now, the schedule,

you only have to pick one. And there's a difference between the two and it's better for you to pick one, but worse for Lehman to pick the other. Is there an ability to -- I would say game the system, but to select in a way that's to your economic advantage and to the defaulting counterparties economic disadvantage.

That's a question, it might be a nonsensical question --

MR. REINTHALER: Uh-huh.

THE COURT: -- but that's what I'm trying to understand.

MR. REINTHALER: Yeah. And in this case, I don't think that question comports with the facts --

THE COURT: Okay.

MR. REINTHALER: -- because we didn't have two firm offers here. We only had one, and that was the Wachovia offer, and which didn't become a firm offer until November 20th.

THE COURT: Okay. So continue my general education here. What --

MR. REINTHALER: If you have two firm offers, if you've gone out and solicited more than one --

THE COURT: Right.

MR. REINTHALER: -- which you're able to do clearly --

THE COURT: Right.

MR. REINTHALER: -- you don't have to go to only one.

THE COURT: Okay.

MR. REINTHALER: And they're identical terms, only one is a higher price than the other, you will have -- I would assume that the non-defaulting party would accept the one that would result in the higher termination payment either to it or by the replacement counterparty to the other.

But that's only where the economic terms of the swaps are identical. If the economic terms of the swaps are not identical --

THE COURT: Because the other one is offering --

MR. REINTHALER: -- because one of them is not a replacement swap on the exact same terms --

THE COURT: Right.

MR. REINTHALER: -- as the one it is --

THE COURT: Right.

MR. REINTHALER: -- you could have a situation where it's more beneficial to one and less beneficial to the other.

THE COURT: Okay.

MR. REINTHALER: There, I think the non-defaulting party has discretion to determine whether or not the

different quote --

THE COURT: Uh-huh.

MR. REINTHALER: -- is in fact a firm offer for an apples to apples replacement as opposed to an apples to oranges replacement.

THE COURT: Okay. All right.

MR. REINTHALER: Which is I think we're getting a little beyond the facts here, but it's really what ended up happening --

THE COURT: Okay.

MR. REINTHALER: -- here with regard to RBS.

THE COURT: Okay. Keep going, thank you.

MR. REINTHALER: The schedules require it in Part 1(k)(ii)(A) which is again on page 5, that the settlement amount which we've now defined, shall be determined no later than the early termination date.

In other words, to avail itself of the market quotation method, and this is different from the ISDA master agreement, under the 2007 schedules, AmeriCredit had to solicit offers, and indeed was expressly permitted to accept a firm offer it received prior to the early termination date, because the last date it can accept an offer is on the early termination date.

THE COURT: That's in A?

MR. REINTHALER: That's in (ii)(A).

THE COURT: (ii)(A).

MR. REINTHALER: Because it says if on the --

THE COURT: Day following ten business days --

MR. REINTHALER: -- day following ten business days after the date on which the early termination date is designated or such later date as party B may specify in writing to party A, but this is the critical part in the parens, but in either case, no later than the early termination date.

In other words, the last day that you can accept a firm offer is the early termination date. And that is also the date on which you are to calculate your loss of the settlement amount payable, and then when you make that calculation, you actually have to pay the money out that day.

So this is not a process that you can drag out and begin the day you send a notice of early termination. This expressly contemplates that the parties are going to go out and begin the process of finding a replacement counterparty before declaring the early termination date because otherwise it would be a physical impossibility to do everything necessary to obtain that firm offer, accept it, paper it --

THE COURT: So go over the words with me again.

MR. REINTHALER: Yeah.

THE COURT: "If on the day following ten local business days, after the day on which the early termination date --"

MR. REINTHALER: Uh-huh.

THE COURT: "-- is designated."

MR. REINTHALER: Right.

THE COURT: So in other words, you're earlier in the process and you say that's going to be the early --

MR. REINTHALER: No, it's actually later in the process. Remember, you can --

THE COURT: The day following ten business days -- the day on which the early termination date is designated --

MR. REINTHALER: Right.

THE COURT: -- is different from and earlier than the early termination date, correct?

MR. REINTHALER: The early termination date can be the date that you notice it, or it can be up to 20 days later, if you remember.

THE COURT: Right.

MR. REINTHALER: So this is dealing with a situation in which you sent a notice out, let's say on November 1, and designated November 20 as the early termination date.

THE COURT: Right. Right.

MR. REINTHALER: And this says --

THE COURT: I got it.

MR. REINTHALER: -- if during that 20-day period or within the 10 days --

THE COURT: Right.

MR. REINTHALER: -- before November 20 you accept something.

THE COURT: Okay. I got it.

MR. REINTHALER: It expressly contemplates that you're going to accept something before the date that you designated as the early termination date.

THE COURT: Okay.

MR. REINTHALER: Okay. And the final relevant provision in the schedules here is in (iii) in Part 1(k) on page 5, and in an obvious effort to minimize or avoid future disputes, what this clause says is that the non-defaulting party, party B in this case, AFS, shall determine in its sole discretion acting in a commercially reasonably manner whether a firm offer is made in respect of a replacement transaction with commercial terms substantially the same as those of this agreement.

Okay. Provided, however, that notwithstanding the provisions of this Part 1(k), nothing in this agreement shall preclude party A, Lehman, from obtaining market quotations. Lehman never availed itself of the right to seek market quotations on its own here.

I did cite finally and I meant -- I should've said there is one other. If you look at the next page of Part 1(l), designation of early termination date. It says notwithstanding any other provision of this agreement, party B shall not designate an early termination date unless such rating agency has been given prior written notice of such amendment designation or transfer.

This is important because, as we explained in our briefs, under the Section 4.5 of each of the insurance indemnity agreements, which govern the financial guarantees, et cetera, the trusts were required to enter into an economically equivalent replacement transaction in form and substance satisfactory to them and to the rating agencies, and the failure to have done so would have constituted an event of default under Section 5.1(n) of those agreements, which would in turn have led to a cascading series of cross defaults in all of AFS's financing agreements.

If all we had was the ISDA master agreement and the schedules, I don't think we'd be here today. Because I don't think Lehman really disputes anything that I've just said in bringing those provisions to your attention.

We now have to go into the confirmation. Like the schedules, the 2007 confirmations were negotiated and executed at the same time as the schedules. Again, they're not preprinted forms.

And according to Lehman, the parties inserted a single sentence on the bottom of page 2 into these confirmations that were intended, that was intended without explicitly saying so to delete Part 1(k) of the schedules and replace it with a provision that required AmeriCredit upon a Lehman default to determine the settlement amount not by reference to a single firm offer, for an economically equivalent replacement, but an entirely different animal and fixed amortization swap, which is a swap that everyone concedes would not have satisfied the language in the ISDA master agreement, or the schedules or AmeriCredit's securitization agreements, would not have been acceptable to the financial guarantors or the rating agencies, and would have led to a clear mismatch between the replacement amounts and the settlement amounts, which would've left the trusts which had no assets or wherewithal to make up the difference out of its own money, in an impossible bind.

Now, there's so many problems with that interpretation of the language, it's hard to know where to begin, but I think we should begin with the language itself.

Preliminarily, though, let's just note that it's hard to believe that parties would have spent the time negotiating at arm's length two plus single spaced pages to insert into the schedules that dealt expressly and explicitly with a Lehman default, only to completely

displace those pages the same day without explicitly saying so with a single sentence in a confirmation that references Section 6 of the ISDA master agreement, but not Part 1(k) of the schedules.

Now, the language that Lehman cites is in a section on page 2, in section 2 entitled notional amount. It's not entitled calculation, it's not entitled payments on early termination.

The section begins with a discussion of how the notional amount is to be determined and reset on each distribution date. And that amount changes in a guaranteed balance swap based on variables, such as prepayments and defaults on the underlying auto loans that are in the pool.

Much of the first three paragraphs in this section on notional amount are devoted to a discussion about what happens upon a default on the part of one of the AmeriCredit trusts, resulting in an acceleration event. Where the underlying notes would become immediately due and payable, thereby reducing the principal balance of the notes to zero.

In that event, Lehman has two choices. It can either terminate the swap or if the swap is in the money, it can allow the swap to proceed with the financial guarantor stepping into AmeriCredit shoes.

In either event, the parties would need to know what notional amount to use for purposes of calculating

either the payments due on future distribution dates, or the amounts payable on termination.

And that's where this language and Schedule A which is attached to this comes into play. Because the stated purpose of Schedule A and the definition of scheduled notional amount which is in that first paragraph is to help Lehman reset the notional amounts following an AmeriCredit default, whether or not it chooses to terminate the swap or continue with it.

It's a substitute, it's a surrogate for the actual notional amount that would be easily calculable at each distribution date if the swap continued, if there had been no default, if the principal amount of the notes continued in existence.

There's no mention anywhere in this entire section on notional amount of a Lehman default anywhere. Nor would there need to be, because there's no need to reset the notional amount where Lehman is the defaulting party. The replacement swap would take care of that. There's no need to use Schedule A.

And therefore, when you read the fourth paragraph here, in the context of what this entire section is doing, and what the first three paragraphs say, the fourth paragraph makes sense. It says, and I quote, "For purposes of determining the settlement amount in the event of an

early termination of this transaction pursuant to Section 6 of this agreement."

It doesn't say pursuant to Section 6 and/or Part 1(k) of this agreement. It only says Section 6. It continues with, "Notwithstanding anything to the contrary contained in the agreement, market quotation will be determined as if this transaction were a fixed amortization swap transaction with an initial notional amount as of the early termination date equal to the scheduled notional balance." That's a key term. "Corresponding to the calculation period in which such early termination date occurs, and amortizing according to Schedule A," also a key phrase in this sentence. "Subject to adjustment to the scheduled notional amount in accordance with the methodology set forth above."

And the methodology set forth above in the two proceeding paragraphs tells you what to do to Schedule A, depending on whether or not the actual notional amount immediately preceding the AFS default was higher or lower than the amount that's on Schedule A. In one case, you adjust it, in the other, you don't.

Again, this sentence makes sense where AmeriCredit is the defaulting party because there, Lehman doesn't have an actual notional amount left that it can use to solicit quotes or to base its calculation of future payments.

Without that sentence that I just read, Lehman would have been relegated to Section 6 of the ISDA master agreement, because remember the schedules don't apply where AFS is the defaulting party. And what Lehman would have been required under the language we read earlier, it would have had to go out and try to solicit market quotations from four reference market makers for an apples to apples replacement swap, which is almost a physical impossibility.

Because there's no one in the market that's going to be able to, let alone willing to give you a market quote for a replacement transaction with a notional amount of zero. You just can't do it.

And that's where I think the reference to Schedule A and the reference to schedule notional balance in this sentence really tells you what the parties intended. Because the scheduled notional amount, which is defined in the first paragraph is only an amount that is defined where there has been a Lehman -- an AmeriCredit default followed by an acceleration event.

Okay. This sentence doesn't talk about the notional amount, it talks about the scheduled notional balance and the scheduled notional amount, which are defined terms that only apply where AmeriCredit is the defaulting party.

And Schedule A as I mentioned only makes sense

because it's a proxy for what the notional amounts would be where it has actually been reduced to zero. So in our view, Your Honor, the tie breaker clause here breaks the tie between Section 6 of the ISDA master agreement and this language. It makes it very clear for the sake of avoidance that this is the way that Lehman would go about pricing a -- determining the settlement amount if it decided to terminate the swap following an AmeriCredit default.

There's no way that AFS or its noteholders or financial insurers or its rating agencies would've allowed the trust to have entered into a swap that would've created the risk of a mismatch between replacement values and settlement values. Okay.

THE COURT: So you're -- there's a schedule.

MR. REINTHALER: Yep.

THE COURT: And it's got U.S. -- it's got the notional amount.

MR. REINTHALER: Correct.

THE COURT: But then here it says a fixed amortization swap transaction with an initial notional amount equal to the scheduled notional balance.

MR. REINTHALER: Right.

THE COURT: Where -- how do I find that?

MR. REINTHALER: Okay. You need to go back to the first paragraph under notional amount. Where it says

that --

THE COURT: Got it, okay.

MR. REINTHALER: Okay. The notional amount shall reset on each distribution date and will be at all times equal to the outstanding principal balance provided however that if an event of default occurs under Section 5.1 of the indenture, that's an AFS default, that's a trust default, the insurer exercises its rights to declare the notes immediately due and payable. So there's been an acceleration of the notes by the financial guarantor. And as a result, the principal balance of the notes is reduced to zero, which is an acceleration event defined.

The notwithstanding the foregoing, the notional amount for the calculation period in which such distribution date falls, and for each calculation period thereafter, through and including the termination date, shall mean the notional amount set forth on Schedule A, the scheduled notional amount. Okay.

So this -- the scheduled notional amount is a defined term that only applies --

THE COURT: But in the --

MR. REINTHALER: I know, it says scheduled notional balance.

THE COURT: Yes, okay.

MR. REINTHALER: Okay. I'll get to that.

THE COURT: I just followed what you just said.

MR. REINTHALER: Okay.

THE COURT: Okay.

MR. REINTHALER: The next two paragraphs talk about how you adjust the numbers on Schedule A depending on whether or not immediately prior to the acceleration event the actual notional amount of the notes was either higher or lower --

THE COURT: Uh-huh.

MR. REINTHALER: -- than the number on Schedule A that corresponds with that date.

THE COURT: So --

MR. REINTHALER: If the amount is lower --

THE COURT: Uh-huh.

MR. REINTHALER: -- it's very complicated.

THE COURT: Okay. But -- so there is no --

MR. REINTHALER: It calls it the note balance notional amount. They don't define the words scheduled notional balance.

THE COURT: Scheduled notional balance.

MR. REINTHALER: But it is clear from the context that it is the adjusted number from the prior two paragraphs in the one instance in the second paragraph on which you would adjust the numbers on Schedule A where the numerator would be the actual notional amount on the date proceeding

the acceleration event. And the denominator would be the number that corresponds to that date on Schedule A, and you would then take that fraction and multiply it on every future distribution date by the number that is shown on Schedule A.

THE COURT: Not to be coy, but then what you're telling me is that whatever very smart person that wrote this document didn't do it perfectly. Because there's a defined term that is, in fact, not defined, and I have to rely on, although it's not particularly relevant, your explanation. And where I'm going with that is simply to go into the paragraph that you're saying is crystal clear --

MR. REINTHALER: Your Honor, I've had the benefit of two and a half years of reading this over and over and over again.

THE COURT: You're two and a half years ahead of me.

MR. REINTHALER: So what's clear to me, I agree, may not be clear to everybody else in the room. But --

THE COURT: I understand your point. I totally -- I absolutely follow your point, you're making them very, very clearly for which I'm grateful. What I'm focusing on, I understand the point about context, I also understand the point that transactional lawyers tell me all the time that headings don't matter. But you're going beyond the heading,

right?

MR. REINTHALER: Oh, I'm definitely going beyond the heading.

THE COURT: You're going beyond the heading.

MR. REINTHALER: I'm talking about what all of this means in context.

THE COURT: In context.

MR. REINTHALER: Because you have to read it in context.

THE COURT: Right.

MR. REINTHALER: And you have to try to discern what the parties' intent was, from reading the language in context. And not only in this context, but in the context of the three documents, two of which were negotiated and executed simultaneously. And contain very different language that deal with a default by Lehman.

And what I submit, Your Honor, is that if you have sophisticated parties represented by sophisticated counsel, sometimes they do make mistakes. But defies logic to think that sophisticated parties with sophisticated counsel would have negotiated and including -- included two plus full pages of very explicit language on what you do in the schedules when Lehman defaults, and then to just wipe it all out with a single reference to something that never mentions a Lehman default in the confirmations.

If they really wanted to do that, they shouldn't have put the language in Part 1(k) in the schedules to begin with. They could have referenced right in here notwithstanding Section 6 of the agreement and Part 1(k) of the schedules. They could have explicitly deleted and replaced Part 1(k) in the confirms.

THE COURT: So why was this put in, and why the reference to the fixed amortization swap transaction? Why was this done?

MR. REINTHALER: Well, Lehman in its complaint says that fixed amortization swaps are more readily available, and it's easier to determine things. But keep in mind, there's no need to replace something at the time. And again, the whole method and mode here, everything that's going on at this time in the market, is to try to make it easier for the non-defaulting party to terminate and to figure out what it owes or what is owed to it.

And again, in the context of an AmeriCredit default, substituting fixed amortization swap would make it easier, and also it's easier to rationalize why they would do that because they are not required to have an apples to apples replacement swap because they'd never be able to get a bid for it.

So here is something they can go to a station --

THE COURT: So this is --

MR. REINTHALER: -- and they can get quotes the same day.

THE COURT: So this would've been --

MR. REINTHALER: At least that's what they represented in the past.

THE COURT: So this would've been a negotiated provision insisted upon by AmeriCredit?

MR. REINTHALER: No. Again, this is outside the four corners of the complaint, but I think we are in agreement that this language was inserted by Lehman into this agreement.

THE COURT: Okay. But then I'm confused. But then why?

MR. REINTHALER: Why? Because Lehman wants to protect itself in the event of an AFS default. The last thing on Lehman's mind in 2007 was that it was going to go into bankruptcy a year later. It was worried about what it should do if its counterparty defaulted.

THE COURT: Okay.

MR. REINTHALER: Okay. So this -- it's protecting itself.

THE COURT: Okay.

MR. REINTHALER: Which is why I think the schedules make sense, commercial sense from AmeriCredit standpoint with Lehman defaults, and this language makes

commercial sense to Lehman on AmeriCredit defaults, but it doesn't make any sense whatsoever if you were to apply it to a Lehman default.

I can now to move to 2005 swap unless you have some more questions about --

THE COURT: Why don't -- it would be helpful for me to -- for you to pause, and for me to hear the arguments on the other side.

MR. REINTHALER: Now, Lehman has an alternative argument on the 2007 swaps, which I can address now or later, they're all --

THE COURT: Why don't you do that.

MR. REINTHALER: Okay.

THE COURT: And then we'll deal with 2007 and then we'll go to --

MR. REINTHALER: Their alternative argument is if you assume that we're right and the schedules control, we nevertheless didn't act in a commercially reasonably way in accepting the one firm offer that we had. And it's -- this is a breach of contract claim, Your Honor. This is -- so you have to look at the language in the contract, and if you look at the language in the schedules which I read to you earlier in Part 1(k)(iii) on page 5, it says "For purposes of clause 4 of the definition of market quotation." So it's only in that limited respect, party B, AmeriCredit shall

determine in its sole discretion acting in a commercially reasonably manner, whether a firm offer is made in respect of a replacement transaction with commercial terms substantially the same as those in this agreement.

So the acting in a commercially reasonable manner modifies the exercise of discretion in determining whether a firm offer has been made for an apples to apples transaction. Now, Lehman says it's got to be more than that, because apples to apples is easy to determine.

Well, these are very complicated documents as we've seen, and it says substantially the same. It doesn't say they have to be identical. So the swap counterparty gets to propose its terms, and then it's up to the non-defaulting party to make a judgment as to whether it fits neatly within the definition of the firm offer. That's the exercise of discretion in which it has to act in a commercially reasonable way. And there's no disagreement in this case that the firm offer that came from Wachovia here was for an apples to apples replacement.

Lehman's argument is that commercial reasonableness should be read far more broadly than what it literally says in this contract, and should encompass when they solicit, how many they solicit, and what they do. That's not what this language says.

THE COURT: Well, that was the point of my

question to you before when you're in firm offer land, right, you're not --

MR. REINTHALER: Right, I'm in firm offer land.

THE COURT: Right.

MR. REINTHALER: And I think --

THE COURT: And not required to get 20 quotes.

MR. REINTHALER: We're not required to get more quotes, and in this case, there was only one firm offer, and it's dated November 20th --

THE COURT: So you can pick up the phone --

MR. REINTHALER: -- and it's attached to the notice.

THE COURT: -- you get a firm offer, and you're saying all that's required is for you to look at that, and determine whether it's --

MR. REINTHALER: Right. Right. It says, sole discretion.

THE COURT: Sole discretion.

MR. REINTHALER: I mean, this is really giving wide latitude to the non-defaulting party to make that determination to make again consistent with the goal of trying to make termination easier, simpler, less expensive with fewer disputes going forward.

THE COURT: Okay.

MR. REINTHALER: Okay. Why don't I stop with

that, and then we can do the 2005 --

THE COURT: Sure.

MR. REINTHALER: -- afterwards, and any questions about Bankruptcy Code claims.

THE COURT: Okay.

MR. REINTHALER: Which is why I have Mr. Neier here. Thank you.

MR. COHEN: Your Honor, may I approach?

THE COURT: Sure.

MR. COHEN: We've done more abbreviated on the ISDA.

THE COURT: Your own charts, how exciting.

MR. COHEN: With the big fonts.

THE COURT: All right. Very good. This -- you gave me three copies, Mr. Cohen.

MR. COHEN: I have one for your clerk and --

THE COURT: Okay. And two for me, excellent. Okay. But we're going to talk about 2007, right?

MR. COHEN: We are going to talk about 2007 which are at the end of the slides, and so we'll turn you to the right pages as they're relevant.

But I think before we start I want to remind myself and everyone that we're here on a motion to dismiss hearing.

THE COURT: Yes.

MR. COHEN: We are not here on a summary judgment hearing. And the response, my reaction when I got AmeriCredit's motion to dismiss and its reply brief, is it chocked full of evidence that is not in the complaint.

So before I jump into the 2007 agreement, I just want to remind the Court of the standards that we should be looking at. When the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the alleged misconduct, the motion to dismiss should be denied.

The Court must accept as true all factual allegations as set out in the plaintiff's complaint, draw inferences from those allegations in the light most favorable to the plaintiff, and construe the complaint liberally, black letter law, and any ambiguity in the contract at issue must be resolved in favor of the plaintiff. I think there are cases that stand for that proposition in both their briefs and our briefs. Those are sort of bedrock principles.

THE COURT: Okay.

MR. COHEN: In order to rule in AFS's favor, though, the Court would have to find that AFS and the Trust neither profited nor obtained any advantage from entering into the Wachovia deal. What has raised Lehman's flag here, and we've had no discovery on it, is the relationship with

Wachovia, one of the other facts that shows up in the AFS brief is it's undisputed that Wachovia is the leading swap dealer for this kind of swap in the world. Therefore, that's where they went.

When you look at sole discretion, you have to tie that to commercially reasonable. There were other bids that were received but were never pursued. And one of the central themes in the complaint, this one cuts against across both the 2005 and the 2007 transactions, is a stale dated number between October and November when you actually had the termination, the market moved decisively in Lehman's behavior.

And while Wachovia or AFS claims it refreshed the number, anybody that we've had look at it, says the number doesn't make any sense, given the market movement. AFS' only response in the papers, and again, this is all extraneous evidence, none of it is in the complaint is, we're not sophisticated, we're not swap dealers, how should we know. And I think we're entitled to discovery on those issues before we get to issues like did they operate in a commercially reasonable manner, did they honor the contract.

THE COURT: Well, but that was what I was trying to get at very unartfully, and haltingly when I was focusing on with Mr. Reinthaler the firm offer language.

MR. COHEN: Right.

THE COURT: Because as opposed to you get quotations and you draw up a (indiscernible) loan whatever you do, what Mr. Reinthaler said was read the language, it doesn't say anything about what you're saying, stale, old, you get to just pick up the phone, get a firm -- get something that you do your apples to apples, determine that it's a firm offer, and make a determination that that is commercially reasonable in your sole discretion, not that it's the best, not that if you made three more phone calls there would be something better. See that's --

MR. COHEN: So --

THE COURT: I still may not have it right, but that's what I'm struggling with, because you're going right to what I was thinking about.

MR. COHEN: Exactly. And I think there are two points to that. One, I agree that that and Section 1(k) --

THE COURT: Right.

MR. COHEN: -- the going out to four and if you have less than three, reverting to loss. But we streamlined all of that.

THE COURT: Right.

MR. COHEN: The idea of going out to one it is the new concept.

THE COURT: Right.

MR. COHEN: But the timing of it remains critical

because we're also constrained by Section 562 of the Bankruptcy Code which says, you have to value this on the termination date or as reasonably practical thereafter if you can't do it on the termination date. And as we all know, you can't contract around the Bankruptcy Code.

Now, there's a safe harbor argument that they make that I think is totally inapposite. They cite the Michigan Housing Development Authority decision, which had to do with who got to do the calculation --

THE COURT: Right.

MR. COHEN: -- as opposed to when you get to do the calculation.

THE COURT: Right.

MR. COHEN: And there are plenty of cases that deal with when you do the calculation. And their idea that even if this was safe harbor, this calculation, that you'd throw Section 562 out the window in favor of the contract, would be unprecedented.

So that's where the stale baiting comes in.

THE COURT: I got it, okay.

MR. COHEN: And when the market moves significantly in that 30-day period, and they have, as acknowledged, the right, but not the obligation to terminate, so they kicked their date, and the Bankruptcy Code says you have to value on your termination date, you

can't use the stale number, and you can't say redate this number, and we're going to use that as the right number. I think that's where you fail commercially reasonableness.

I think the other thing that the Court would have to find as a factual matter is why this provision was put in. The Court asked the question sort of in a very broad way about the intent of the parties. There's no evidence of that. And what you heard is counsel basically telling you what he thinks makes sense.

THE COURT: Well, I think what he was trying to say was, I agree with you, but I think what he was saying was that to pick up on where you started, you know, an Iqbal versus Twombly kind of analysis --

MR. COHEN: Exactly.

THE COURT: -- it would be implausible to read it any other way of the way that Mr. Reinthaler said it ought to be read. That's the way I think he tells me to get around your point.

MR. COHEN: Well, and I think we can go back to sophisticated lawyers. I mean, AFS was represented by Dewey Valentine at the time. If they wanted Section 6, the confirm to say, in the event of an AFS default they should've written that. That's not what it says.

Let's look exactly at what the contract says. So I'm on page 7 of the master agreement. So first of all,

what it says is, "For purposes of determining the settlement amount in the event of an early termination of this transaction pursuant to Section 6 of the agreement."

Now, what we know is Section 1(k) changed the definition of market quotation.

THE COURT: Market quotation.

MR. COHEN: But it didn't strike out Section 6, it just changed the definition of market quotation, and in relevant part, what it did, was it got rid of going out to four, and substituting for one. That's what it dealt with.

So this says, "notwithstanding anything to the contrary contained in the agreement, market quotation will be determined as if this transaction were a fixed amortization swap transaction." Those are the clear words in the contract. It says nothing about whether it's an AFS default or a Lehman default.

And what counsel would like to do is take the provision, you know, the idea that -- because it doesn't say a Lehman default, therefore, it doesn't apply to a Lehman default, it applies to generally. That is the way it was written, that is the way it was put in.

I think it's agreed by both sides that determining and getting a replacement for a fixed amortization swap is easier than a guaranteed balance swap in terms of speed, efficiency, that's in everybody's interest, if speed and

efficiency is actually what they're looking for.

Now, we heard a lot of argument, I would say evidence or testimony about what rating agencies, what noteholders, what other people would have accepted, and what would have been commercially reasonable at that time in these circumstances, but none of that is evidence. I think we are at a minimum on this, entitled to discovery because Section 7 or rather the confirm says what it says. What we have pled is exactly what the complaint says.

And you heard 45 minutes, 50 minutes of a walk-through a very complicate convoluted contract which clearly by its own terms contemplated inconsistencies within it because we included language like notwithstanding anything to the contrary contained in the agreement. If you didn't think there were going to be inconsistencies, you would never need to put language like that in.

New York law is very clear, that that language should be respected and enforced. We think the contract is unambiguous and should be enforced on its terms. The Court clearly has questions about how the quotes were obtained, what were the parties thinking, how was this negotiated, why was it done, and counsel has given you all kinds of answers, none of which are evidence.

We don't think on Section 7 or on the 2007 rather that the plain reading of the contract supports a motion to

dismiss. We think the plain reading of the contract supports our position. We win.

In terms of the timing I think the stale dating goes to the commercial reasonableness and it's a Bankruptcy Code obligation, and that's clearly going to override the contract.

THE COURT: Okay.

MR. COHEN: Okay.

THE COURT: Thank you. All right. You can go to 2005.

MR. REINTHALER: Before I forget just one postscript --

THE COURT: Yes.

MR. REINTHALER: -- commercial reasonableness only comes into play if the schedules control the process. Because the language is in the schedules. So he has to be conceding that the confirms don't govern for him to be arguing that there's a commercial reasonableness issue with respect to the 2007 swaps.

THE COURT: I'm not sure about that. I hear you, but I'm not sure about that. Let's keep going.

MR. REINTHALER: Okay. 2005, the issues here are a little more straight forward because there's no Part 1(k) and there's no magic as if clause in the confirms for this relatively small swap, which is sort of the tail wagging the

dog in this case.

I think if the 2005 swap were the only issue in the case, we probably wouldn't be here, we would've resolved this a long time ago.

So under the 2005 swap, we're governed by the ISDA master agreement again, which would have required AmeriCredit upon the Lehman default to solicit quotes from at least four referenced market makers for an apples to apples replacement.

Here, the complaint asserts that we more than met that requirement, because we solicited more than four reference market makers. We did not receive the minimum of three quotations necessary to determine the early termination payment.

So under the ISDA master agreement, everyone concedes that we were required to follow the loss method pursuant to which the settlement amount is defined to mean the amount that the non-defaulting party, AmeriCredit quote, reasonably determines in good faith to be its total losses and costs or gains in which case expressed as a negative number. The non-defaulting party is given wide berth to make this determination as the definition of loss goes on to make clear that the non-defaulting party may, but not -- but need not determine its loss by reference to quotations of relevant rates or prices for one or more leading dealers in

the relevant markets.

So if we've solicited market quotations, haven't gotten the requisite three, we can still use the ones that we did get if we choose. We don't have to. But we can use those for purposes of determining the loss.

Here, the 2005 trust determined its loss by reference to the one and only firm offer it received and accepted from Wachovia. Now, the definition of loss does require the non-defaulting party to determine the loss as of the relevant early termination date, or if that is not reasonably practical, as of the earliest date thereafter, that is reasonably practical.

That date here is November 20. Lehman quibbles with the timing of the Wachovia quote, but in doing so, it must misreads the contract. The Wachovia offer that AFS accepted, which is attached to the complaint was dated November 20, 2008. It's Exhibit E to the complaint.

Exhibit E to the complaint is the -- begins with the November 21, 2008 notice of calculation of early termination payment that was sent the day after the notice of the declaration of the early termination date. Attached to that, the third page of Exhibit E is something called Exhibit B to that, which is the firm offer.

Quotation date, November 20, 2008, so it's clear from Lehman's own complaint and the documents attached to it

that the market quotation that it used for the purposes of determining the early settlement amount is, in fact, one that was dated the early termination date.

Now, Lehman argues that well, yeah, it might have been dated that date, but it's really a stale number. It's really a number that Wachovia determined back in October when you initially asked it to submit an indicative offer.

It also complains that we acted prematurely in going out into the marketplace before November 20 to solicit bids to try to find out whether we could replace this transaction. And they argue that the contract required that the trusts seek bids from dealers on or after the early termination date, not before.

In other words, their argument is that we were not even entitled prior to November 20 to go out into the marketplace and solicit quotations. That's not what the master agreement says. There's nothing in the ISDA master agreement that precluded the AmeriCredit Trust from soliciting quotes before the early termination date as long as the firm offer or the bid that it accepted bore an as of date on or as soon as reasonably practical after the early termination date. And that's exactly what the offer attached to the complaint does.

And again, we talk about common sense, we talk about plausibility. It is implausible for Lehman to suggest

that it would've been possible for AmeriCredit to have gone out solicited quotes from four reference market makers, obtain the quotes that it could, compared them, shared them with the rating agencies and the financial guarantors, and with the trustee of the notes, negotiated contracts, determined which of them, if any, were acceptable. And then realizing they don't have three, to then have to calculate its loss to do it all starting on November 20 when the contract required you not only to determine the settlement loss as of that date, but to actually make the payment that day. It's impossible.

In order to declare an early termination date, you have to have your ducks in a row. You have to go out before the early terminate date and try to solicit quotes.

THE COURT: So what if -- so you have -- from the time that you've designated an early termination date to the early termination date the maximum period of time is 20 days?

MR. REINTHALER: Twenty days.

THE COURT: Okay. So what's to stop you again, just trying to understand how this actually works, you -- it's November 1st, you say my early termination date is November 20th.

MR. REINTHALER: Uh-huh.

THE COURT: What stops if you the market is moving

between November 1st and November 20th, yes, you have to have your ducks in order. So on November 2nd, you get a quote it's not great. Each day it changes, you get something on November 2nd that's dated as of November 20th, but had you gone back out, it might have been more advantageous to the defaulting party.

I might be making this up, and it's reflecting --

MR. REINTHALER: It's an interesting hypothetical, Your Honor, that would apply in a situation where it would've been advantageous to AmeriCredit to have gamed the system so to speak that way. But here, we weren't talking about money coming from Lehman to us upon termination.

Here we were talking about money that Wachovia was going to pay to Lehman. AmeriCredit wasn't going to be writing a check or receiving a check. Again, it has no incentive to game the system. What it does have is it has contractual obligations to its noteholders, and to its financial guarantors to replace this within a certain number of days after it declares a default.

THE COURT: Uh-huh.

MR. REINTHALER: In this case, one of the agreements required 40 days, and the other required -- it took them 60 days from the date they first went out to start locating potential counterparties to actually get a final firm quote dated November 20th.

I mean, it took that long. Now, remember, we're in an unprecedented market --

THE COURT: Right.

MR. REINTHALER: -- where there's chaos.

THE COURT: Chaos, right.

MR. REINTHALER: And the financial guarantors and the rating agencies are being swamped with hundreds or thousands of early termination notices. And they don't have the personnel to deal with them. I mean, this is not something that could have been done overnight under those extraordinary conditions under which people were living at the time.

So what is -- so that really makes Lehman's argument boil down to, well, the November 20 quote, if it is a quote as of that date, is stale because it's so similar to and so close to the amount that you provided earlier. And in the intervening period, there has been a change in live or rates that should have worked according to them to result in a higher settlement amount being paid to them.

So they say that either we accepted a stale quote, or we needed to go out and resolicit people because of the change in interest rates. But the non-defaulting party has no way of knowing why Wachovia or others priced their replacement swaps the way they do.

There were all kinds of things happening in the

market here. Wachovia, I mean, the reference market makers were under financial stress tests. Some of them were not quoting for replacements at all. You had the automobile industry was in chaos at the time, and AmeriCredit's own financial ratings were under serious stress. There are a lot of things that go -- get factored into how much someone is willing to pay to replace Lehman as a swap counterparty here.

So I don't think you can just simply take one isolated factor that could've influenced swap prices on a given day as Lehman has done, to the exclusion of all others, and say, ah-ha, that means that the November 20 offer really isn't the November 20 offer when it's dated that on its face.

Lehman argues that the Wachovia offer was below market. But it was the only offer. By definition, it was the market. It's not a situation where on November 20 AmeriCredit was sitting with multiple quotations. The only one it had is the one that it attached. It was the only game in town, and it could ill afford on November 20, given its obligations under its other documents to lose the bird in the hand before it flew away. I mean, it really had to accept that offer then or it was in serious risk of not being able to accept any offer, and therefore, it would've started this cascading series of defaults.

Why don't I turn this now over.

THE COURT: Yes, thank you.

MR. REINTHALER: Okay.

MR. COHEN: One more thing before I go to 2005, I want to address. The alleged concession that I made that the confirm doesn't control the 2007, my point was, the confirm was not inconsistent with the Schedule 1(k), because what 1(k) does is it takes out four and puts in one.

THE COURT: Understood.

MR. COHEN: And we concede that.

THE COURT: All right. So 2005.

MR. COHEN: So 2005 is really the timing issue. And without getting into evidence, and I think counsel did a lot with respect to 2005, I'd like the Court to think hypothetically that the live or rate fell from 4.18 to 1.39 in the period between October 13th and November 20th. And it is strange credulity to suggest that AmeriCredit which is a sophisticated financial entity didn't appreciate that that would have an impact on the obligation.

It also strains --

THE COURT: But what if they did? What if they did and if the contract enabled to ignore that?

MR. COHEN: I don't think the contract does enable them to ignore that, because it has to be commercially reasonable, and the market undertook a massive move during

that period. I also thought that the choice of words that what had to be accepted or a date as of the early termination date is interesting. It doesn't have to bear the date as of the early termination date, it has to be an evaluation as of the early termination date.

So the fact that it may say November 20th if it's an October 15th valuation that doesn't pass the test. The other issue --

THE COURT: Well, the language -- we're in the ISDA, and we're in the definition of loss, right? Because there --

MR. COHEN: Right.

THE COURT: -- weren't multiple quotations. And the sentence says, "A party will determine its loss as of the relevant early termination date or if that is not reasonably practical, as of the earliest date thereafter," so that doesn't apply. "A party may, but need not determine its loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets." That's what you're focusing on?

MR. COHEN: That is. And what my argument is that when you terminate on November 20th and October 15th rate is not a relevant rate. The ISDA and the Bankruptcy Code make crystal clear that it is on the termination date, or if, for example, on September 11th when the markets were closed, the

stock market shutdown, you couldn't get dates as soon as reasonably practical thereafter.

I mean, given your experience in the Lehman case, and your experience with derivatives, I think you've seen that people were able to function in these markets.

You know, one of the arguments that we heard is, well, the Wachovia number may have stayed the same because there's all kinds of factors, and it's not just live or. Well, that to me suggests you need discovery on that too, and that's expert discovery. We believe that that was the largest driver, they have suggested a parade of other things that it might have been, but have not identified them.

THE COURT: Are you also implicating the fact that the definition recites that the loss must be determined in good faith?

MR. COHEN: Correct. And moreover, there's a more fundamental problem is we heard all kinds of reasons that AmeriCredit said it couldn't possibly comply with the literal terms of the contract, which to me sounded like conceding a breach. But at a minimum what they were supposed to do when they set the early termination date of November 20th was go out to the market and attempt market quotation and reach out to four dealers then, and they didn't.

And their explanation is, you know, it took us 60

days to put this together, which there's no evidence of that, and we would've lost the bird in the hand. There's no evidence of that.

So what you've got here is a failure to follow the market quotation process and admission here, that they were unable to follow the terms of the contract that they agreed to using what we believe to be an outdated number by months, which had an in excess of $14 million move on the money that Lehman would have received just by that alone, and all of that ties into lack of good faith, not commercially reasonable.

I mean, good faith at a minimum attempted them -- required them to attempt to comply with the contract. And what's clear with respect to the 2005 transaction is they just threw it out the window.

THE COURT: Okay. Thank you. Mr. Reinthaler, any last thoughts?

MR. REINTHALER: May I ask Mr. Neier to address the 562 argument --

THE COURT: Okay.

MR. REINTHALER: -- if that's okay.

THE COURT: Yes, but briefly. I think we've -- it's well covered in the papers.

MR. NEIER: Good afternoon, Your Honor, David Neier --

THE COURT: Good afternoon, Mr. Neier.

MR. NEIER: -- on behalf of AFS. I think it is well covered in our papers. Mr. Cohen said that you can't contract around the Bankruptcy Code --

THE COURT: Right.

MR. NEIER: -- but, of course, Section 560 specifically allows you to sign a contract notwithstanding anything in the Bankruptcy Code with respect to how you net out, offset, or terminate a swap agreement. So it's pretty -- and Judge Peck ruled in this case that in fact Section 560 allows you to precisely ignore the Sections in 562 to allow you -- for parties to contract their way and find their own method of termination of a swap agreement.

So that's really all I can add on that point.

THE COURT: Okay. All right.

MR. NEIER: This is, as Mr. Reinthaler has said, a breach of contract case.

THE COURT: Right.

MR. NEIER: It's not a Bankruptcy Code case.

THE COURT: Mr. Cohen, anything more?

MR. COHEN: No, Your Honor.

THE COURT: Okay. All right. Thank you very much. You've given even more to think about than I had before I came out this afternoon. So we will be back to you in due course. Thank you very much.

(Proceedings concluded at 3:35 PM)

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C E R T I F I C A T I O N

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